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IN THE SUPREME COURT OF OHIO

No. 32938

MOTORS INSURANCE CORPORATION, A CORPORATION, THE AVONDALE MOTOR CAR COMPANY, A CORPORATION, FRED KAHN, AND JOHN L. CASHMAN, FOR THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

vs.

WALTER A. ROBINSON, AS SUPERINTENDENT OF INSURANCE OF OHIO AND ROBERT L. MOULTON, AS DIRECTOR OF COMMERCE OF OHIO,

Defendants-Appellees

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants, Motors Insurance Corporation, The Avondale Motor Car Company and John L. Cashman (plaintiff Fred Kahn being deceased), submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the Supreme Court of Ohio entered in this cause.

Opinions Below

The judgment of the Supreme Court of Ohio dismissing appellants' appeal from the judgment of the Court of Appeals of Franklin County, Ohio is reported, 157 Ohio St. 354.[1] A copy of the judgment is attached hereto as Appendix A. The Supreme Court of Ohio, in accordance with its practice, wrote no opinion accompanying its judgment or accompanying its denial of appellants' motion to certify.

The opinion of the Court of Appeals of Franklin County, Ohio which accompanied its judgment affirming the judgment of the Common Pleas Court of said County, is not officially reported, but may be found in 62 Ohio Law Abstracts 72.[2] A copy of the opinion is attached hereto as Appendix B.

The opinion of the Common Pleas Court of Franklin County, Ohio which accompanied its judgment sustaining appellees' demurrer to appellants' petition herein is not officially reported, but may be found in 62 Ohio Law Abstracts 58.[3] A copy of the opinion is attached hereto as Appendix C.

Jurisdiction

The decision of the Supreme Court of Ohio, the highest court of the State, was announced March 19, 1952. Application for rehearing filed April 2, 1952, was denied April 23, 1952. Rule XX, Section 1 of the Supreme Court of Ohio permits an application for rehearing of a cause or motion to be made within fourteen days after the announcement of the decision.

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[1] "Ohio Bar", Apr. 7, 1952.
[2] "Ohio Bar", May 12, 1952.
[3] "Ohio Bar", May 12, 1952.

A petition for appeal is presented herewith to the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, on July 1, 1952. The appeal is timely. Title 28 U.S.C. Sec. 2101 (c); *Market Street Railway Co.* v. *Railroad Commission,* 324 U. S. 548, 552; *Department of Banking* v. *Pink,* 317 U.S. 264, 266; *Chicago G. W. R. R. Co.* v. *Bashan,* 249 U.S. 164.

The suit was brought to enjoin the Superintendent of Insurance of Ohio and the Director of Commerce of Ohio, acting under color of the Superintendent's interpretation of certain Ohio statutes, from depriving appellants (other than Motors Insurance Corporation) and those represented by them—all of whom are automobile dealers or employes thereof nominated by Motors Insurance Corporation as its insurance agents—of their right to act or qualify to act as insurance agents of that corporation in soliciting and selling motor vehicle physical damage and theft insurance, in excess of a limitation prescribed under color of such interpretation, to purchasers of automobiles from them, and from thus depriving Motors Insurance Corporation and such others of the right to conduct an insurance business without regard to such limitation.

The validity of the Ohio statutes, as so construed and applied, was specifically drawn in question by appellants as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. This was done in appellants' petition for injunctive relief filed in the Common Pleas Court of Franklin County, Ohio, in which they challenged the correctness of the construction and application given by the Superintendent of Insurance to the Ohio statutes involved and, in the alternative, contended that such construction and application, if correct, would render the statutes void for the foregoing reasons particularized in the petition (pars. 16, 18, 19). The Common Pleas Court having sus-

tained appellees' demurrer to the petition and appellants having elected not to plead further, final judgment was entered against them, and they immediately appealed to the Court of Appeals of that county. In that Court the identical questions were raised by assignments of error, as follows:

> "5. The Common Pleas Court erred in holding that said statutes, if construed as the defendants and said court construe them, are valid.
>
> "Said court should have held that, if so construed, said statutes would be violative of Article I, Section 1 of the Constitution of Ohio and of the Fourteenth Amendment of the Constitution of the United States, in that they would deprive the plaintiffs and those represented by them of their property, and the individual plaintiffs and represented individuals of their liberty, without due process of law; and would also be violative of Article I, Section 2 of the Constitution of Ohio, and of the Fourteenth Amendment of the Constitution of the United States, in that they would deny to the plaintiffs and those represented by them the equal benefit and protection of the laws; and that, if so construed, said statutes would, in their application to the plaintiffs and others in like situation, be void.
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> "6. The Common Pleas Court erred in holding that the manner in which said statutes had been and were threatened to be applied by the defendants therein is valid.
>
> "Said court should have held that said manner of application, hereinabove described, is violative of each and all of the constitutional provisions enumerated in the last preceding assignment, and therefore, void."

The Court of Appeals affirmed the judgment of the Common Pleas Court. Appellants, within time, appealed to the Supreme Court of Ohio and in addition moved it to certify the record of the Court of Appeals on the ground that the case was of public and great general interest, thus satisfy-

ing all conditions suggested in *Stratton* v. *Stratton*, 239 U.S. 55. *Matthews* v. *Huwe*, 269 U.S. 262, 265-6; *Tumey* v. *Ohio*, 273 U.S. 510, 515; *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20. The constitutional questions were raised in the Supreme Court of Ohio by identical assignments of error. The Supreme Court of Ohio denied the motion to certify and, on appellees' motion, dismissed the appeal on the ground that it presented no debatable constitutional question. (Appendix A.)

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, U.S.C., Section 1257(2). *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459; *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U.S. 251; *California State Automobile Association Inter-Insurance Bureau* v. *Maloney*, 341 U.S. 105; *Tumey* v. *Ohio*, 273 U.S. 510; *Hetrick* v. *Village of Lindsay*, 265 U.S. 384; cf. *Matthews* v. *Huwe*, 269 U.S. 262, 266. By deciding that this case presented no debatable constitutional question the Supreme Court of Ohio upheld the statutes as so construed and applied. *Fidelity & Deposit Co. of Maryland* v. *Tafoya*, 270 U. S. 426, 434; *Sterling* v. *Constantin*, 287 U.S. 378, 393-4; *Query* v. *United States*, 316 U.S. 486, 488-9.

Questions Presented

Where automobile dealers or their employes are licensed as insurance agents to sell motor vehicle physical damage and theft insurance and, in the normal course of their automobile business, use their licenses to sell insurance to their automobile purchasers, may a State, without violating the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, revoke their insurance licenses solely because such insurance business constitutes the principal use of the agents'

licenses? Where the applicable Ohio statutes, as so interpreted and applied, have the effect of making it impossible for a person connected with an automobile dealership to receive and practically impossible for him to hold such a license, do the statutes violate either or both of those provisions of the Fourteenth Amendment? In particular, if the sole purpose of the Ohio statutes, as so interpreted and applied, is, as indicated by the Common Pleas Court, to deprive such licensees of a natural competitive advantage ("to prevent an unfair advantage"—see Appendix C) over other insurance agents not so situated, is that a valid public purpose—does it in any way further the interests of the insuring public? If the "unfair advantage" to which the Common Pleas Court referred is a supposed opportunity to engage in the *illegal* practice of tying-in the sale of insurance with the sale of an automobile, is the principal-use limitation rational in any respect as a means of eliminating, or even reducing, such illicit temptation and such illegal conduct? Do the Ohio statutes, as so interpreted and applied, work discriminations, invalid under the equal protection clause of the Fourteenth Amendment, (1) in favor of automobile dealer-insurance agents who by reason of previous establishment of an insurance clientele or otherwise find it practically possible from inception of their licensure to overmatch the numerical volume of insurance effected for their automobile purchasers by the volume of other insurance business, and against such automobile dealer-insurance agents whose situation does not present that practical possibility; (2) against automobile dealer-insurance agents and in favor of insurance agents engaged exclusively in the insurance business; and (3) against automobile dealer-insurance agents and in favor of those part-time insurance agents whose other occupation does not involve the retail sale of merchandise which, immediately upon sale, becomes a potential subject of separate insurance pro-

tecting the purchaser against loss or physical damage. Is the principal-use test of the Ohio statutes, as interpreted and applied, a rational line of demarcation between such classes?[4]

Statutes Involved

The statutes involved, the validity of whose interpretation and application is questioned, are Sections 644 and 644-3 of the General Code of Ohio.[5] The material portions[6] are:

> "Section 644. * * * Upon written notice by an insurance company authorized to transact business in this state of its appointment of a person to act as its agent the superintendent of insurance, if he is satisfied *that the appointee* is a suitable person and *intends to hold himself out* in good faith *as an agent:* that appointee is honest, trustworthy and understands the duties and obligations of an agent and is familiar with the insurance laws of the state and with the terms and provisions of the policies and contracts of insurance he proposes to effect; *that in applying for such license it is not appointee's purpose or intention principally to solicit or place insurance on* appointee's own *property* or that of relatives, employers or employees or that

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[4] All points raised in the Assignment of Errors are also presented. The questions presented, as stated above, set forth the major issues.

[5] There is no official edition of the General Code of Ohio. Section 644 appears on pages 407 and 408 of Page's Ohio General Code Annotated, Volume 1, and on page 70, Throckmorton's Ohio Code Annotated, Part First, Baldwin's 1948 Revision. Section 644-3 (as amended, effective August 12, 1949) appears on page 126 of the Cumulative Pocket Supplement, Volume 1, of Page's Ohio General Code Annotated, 1951, and on page 73 of Throckmorton's Ohio Code Annotated, Baldwin's Permanent Service 1948-1952.

[6] Underscored portions are particularly material to the construction issue raised by appellants in the State courts. Section 644 is quoted in full in the annexed opinion of the Common Pleas Court (Appendix C). Section 644-3 as quoted in that opinion is the version in force prior to August 12, 1949.

for which they or *the appointee is* agent, custodian, *vendor,* bailee, trustee or payee, shall issue to appointee a license * * * that the person named therein is a constituted agent of the company * * * for the transaction of such business as it is authorized to transact * * *. The superintendent of insurance, after the granting of such license, for cause shown, and after a hearing, may determine any persons so appointed or any person heretofore appointed * * * to be unsuitable to act as such agent, and shall thereupon revoke such license and notify both the company and the agent of such revocation. Unless revoked * * * or unless cancelled * * * on written notice from the company or the agent * * * such license * * * or any renewal thereof shall expire on the 30th of June next after its issue. * * *"

"Section 644-3. It shall be the duty of the superintendent of insurance to refuse to grant any licenses applied for, and to refuse to renew, and to revoke any license of or to any * * * agent, * * * when he is satisfied that *the principal use of such license has been or is * * * to solicit, place or effect * * * insurance directly or indirectly upon* or in connection with the *property* of such * * * agent * * * or that of relatives, employer, employees, or that *for which* they or *the * * * agent* * * * are or *is* agent, custodian, *vendor,* bailee, trustee or payee, or to evade or violate the provisions of Section 9589-1 of the General Code. * * *"

Statement of Case[7]

Appellant Motors Insurance Corporation is engaged solely in the business of insuring against physical damage to and theft of motor vehicles (par. 1). When this action was instituted it was conducting that business in Ohio as well as in 44 other jurisdictions through licensed agents

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[7] All references under this heading are to the petition for injunctive relief, to which the defendants-appellees demurred.

also connected with automobile dealerships (*id.*). Approximately 1100 such agents were licensed in Ohio over a period of time following the company's commencement of operations there in September 1948 (par. 3). Less than a year later, shortly after August 12, 1949, the Superintendent of Insurance sent questionnaires to these agents requiring them to list the insureds in all policies written by them and to state in how many instances the subjects of insurance (automobiles) had been sold by the agents or their employers (pars. 16 and 17 "b"). On the basis of the answers to these questionnaires (which showed that most of the policies insured persons to whom the agent had sold cars) and the Superintendent's interpretation of the principal use provisions of Sections 644 and 644-3, the Superintendent revoked the licenses of certain agents and, while statutory appeals in these cases were pending, refused to renew the annual licenses expiring June 30, 1950 of all but three of the other agents (par. 17). In addition, he refused to issue new licenses to appointees of Motors Insurance Corporation who were in anywise connected with automobile dealerships (pars. 17 "a" and 21). Accordingly, in view of the community of interests and inadequacy of statutory remedies this representative class action for an injunction was filed June 21, 1950 in the Common Pleas Court of Franklin County.

The defendants (appellees here) by demurring to the petition, admitted all well-pleaded facts. All of these agents meet the qualifying requirements for original issuance and renewal of licenses provided in Section 644; that is, all are suitable persons—they are honest, trustworthy, understand the duties and obligations of an agent and are familiar with the policies of insurance they propose to effect—and they have also held themselves out in good faith as insurance agents (pars. 2, 4, 5, 6).

Motors Insurance Corporation is fully qualified to do the described business in Ohio, and has complied with all of the Ohio laws (par. 2).

It is further admitted that a great many automobiles, as is well known, are sold under installment contracts that require insurance against loss of or damage to the car to protect the financing institution and the buyer (pars. 9, 10, 11); that these dealer-insurance agents had solicited and, at the option of their automobile customers, had placed such insurance for most of them (par. 11), and had also solicited and sold insurance to their cash purchasers of cars, to persons to whom cars had been sold by others and to persons in renewal of expiring policies (par. 12); that in no instance was the dealer-agent a party insured (par. 14); that the entire premium cost was borne solely by the car purchasers (par. 15); and that no car purchaser has been required to buy the insurance solicited by the agent as a condition of the purchase or of the financing of the car (par. 11).[8]

Facts susceptible of judicial notice include (1) the fact that an automobile, due to its mobility, is in a class by itself as a subject of insurance, because it cannot be covered by an ordinary household goods policy; (2) the immediate subjection of the car, upon delivery, to such peculiarly imminent risks as collision, fire and theft, and the many other risks covered by the standard automobile physical damage policy; (3) the fact that such insurance should, and in installment transactions must, be effective after sale immediately upon delivery; and (4) the fact that all such policies are written for limited periods (at least one year

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[8] Section 9589-5, Ohio General Code (found on p. 134 of the Cumulative Pocket Supplement, Volume VI, of Page's Ohio General Code, Annotated, 1951, and on p. 193 of Throckmorton's Ohio Code Annotated, Baldwin's Permanent Service 1948-1952) makes such conduct a criminal offense and requires immediate license revocation.

and for the duration of the installment contract, if any), although subject to renewal. Plainly the opportunity of convenient insurance service afforded by dealer-insurance agents to automobile buyers needing physical damage insurance is a public good and just as valuable to both sides of the transaction as that afforded, in a different field, by real estate agents who almost universally are also insurance agents. Plainly, also, this opportunity of service naturally yields insurance business to the dealer-agent which, at the outset of his licensed experience, is bound to make up the greater portion of his insurance placements.

The demurrer to the petition thus put in issue solely the correctness and constitutional validity of the Superintendent's construction and application of Sections 644 and 644-3 to these facts.

Appellants, on the basis of the internal logic of all the terms of these statutes, their legislative history, and their relation to other statutes *in pari materia*, contended that the true and only valid meaning of the statutory words "insurance • • • upon • • • property" is that they necessarily refer to insurance protecting *persons*[9] (the agent himself, his relatives, employer or employees—the only *persons* described in the statutes), and that the enumeration respecting property "for which" the insurance agent or his "relatives, employers or employes • • • is • • • agent, custodian, vendor", etc. obviously refers to various *continuing capacities* of such insured persons giving rise to their insurable interests in property.

On these premises they contended that the evil against which the provisions in question are aimed is the excessive ("principal") use of an insurance agent's license to obtain insurance for the agent himself at reduced cost by

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[9] There is no such thing as insurance "upon property". That expression is a common barbarism: Only *persons* are insured.

virtue of his commissions or to act as a purchasing broker for certain others in close personal or economic association with himself ("relatives, employers, employees"), in which event he would not be "holding himself out in good faith as an agent" (although such use, to a moderate extent, is permitted by Ohio law).

The Superintendent of Insurance, however, construed and applied the words "*upon* • • • *property* • • • *for which* • • • the appointee • • • *is* • • • *vendor*" as embodying a limitation upon the agent insuring *customers* of his other business in respect of property sold by him to them (par. 16). In other words, the quoted phrase was taken to refer to insurance covering the *vendee* of property which the agent *had sold* and "for which" he *had been* the vendor.

Appellants also contended that—whatever the restricted class of insured persons may be—the terms "principally" and "principal use" can only validly be interpreted as requiring the Superintendent of Insurance to exercise a reasonable discretion, taking into account, particularly in the case of newly licensed agents, their unsuccessful solicitations and—under the Superintendent's view as to what constitutes the restricted class—the prospects of annual renewal business and other business derived from insureds not in the category of vendees in contemporaneous transactions involving the sale of automobiles. However, the Superintendent applied "principally" and "principal use" as requiring denial of licensure, if, on the basis of merely an arithmetical count, a majority of policies were issued during a given period of time to persons in what the Superintendent conceived to be the restricted class (automobile buyers) and considered that such arithmetical count could be taken, as here, after the lapse of an unreasonably short period of time from inception of licensure. In the case of new automobile dealer-applicants, the Superintendent assumed, not unreasonably, that such persons would,

if licensed, effect a majority of policies in the supposed restricted class—at least during the first license year—and he therefore refused to issue first-time licenses to such persons.

It is obvious that the restrictive force of the Superintendent's construction and application not only practically prevents the ordinary dealer-agent who has held a license for a limited time from continuing in license (pars. 7, 17); but now that the Superintendent has taken his position with respect to new applicants, prohibits the initial licensure of any automobile dealers as insurance agents (pars. 17 "a" and 21). A newly licensed dealer-agent normally begins business without any backlog of insurance renewals or any clientele of prospects other than his automobile purchasers. Under the Superintendent's construction the dealer-agent is practically deprived of his most natural opportunity even to get started. At once confronted with the opportunity of serving his car purchasers (most of whom, being "time" buyers, are required to have insurance) by soliciting them to purchase insurance from him, he would have to forego many such opportunities until he had gone out of his way and matched that type of insurance business with new business which would not normally come his way, until his insurance production record—whatever its volume—was in "proper" balance percentagewise. Thus, even if the average newly licensed automobile-dealer-agent were able to develop an "outside" insurance clientele, he would have to say at various times to many a car purchaser insurance prospect: "I'm sorry. I can't offer you this insurance. You'll have to go elsewhere for it. Yesterday I could have sold it to you. Tomorrow I might be able to—but unfortunately you need it, of course, right away."

The State courts having sustained appellees' contentions, their construction and application of the statutes must

necessarily be accepted as binding upon the United States Supreme Court.

The Questions Are Substantial

The questions presented are not only novel and of great importance to the automobile insuring public but are substantial.[10]

The restrictive force of the Superintendent's construction and application operates exclusively to the distinct advantage of competing insurance agents not connected with automobile dealerships by depriving dealer-agents of a natural competitive advantage without the saving grace of serving also to benefit the insuring public in any way; indeed, it operates to the distinct disservice of that public. In the words of the Common Pleas Court—whose opinion is the only one which contains any discussion of the statutes:

> "The purpose of the restriction was undoubtedly intended to prevent an unfair advantage in the placing of insurance and the licensing of persons who were not intending to do a general insurance business, but simply to supplement their primary business of selling automobiles."
>
> "* * * the restrictions with respect to insurance on property of which the licensee or his employer is the vendor applies [sic] to the time the sale is consummated, and the licensee is in an especially advantageous position to place the insurance."

The court thus considered "unfair" the competitive advantage of a dealer-insurance agent. This advantage however is natural and legitimate, and is expressly recognized as such not only by Sections 644 and 644-3 themselves but

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[10] Although the Ohio Supreme Court held that no "debatable constitutional question" was involved, it will be observed that three of the seven members of that court did not concur in this conclusion, although, in fact, all members participated in the consideration of the case.

by two recently enacted Ohio statutes: the Retail Installment Sales Act [11] and the law against tying in insurance with the sale of a commodity.[12] Thus, the Ohio statutes, unlike the statute involved in *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, expressly sanction, rather than forbid, the contemporaneous conduct of two businesses, here, the automobile sales and automobile insurance businesses. Cf. *Hauser* v. *North British Mercantile Insurance Co.*, 206 N.Y. 455, 100 N.E. 52, 53-4. In this connection, the Common Pleas Court, proceeding from its erroneous conception of the holding in the *Daniel* case, suggested that the Ohio legislature might also "in theory if not in fact" have intended to curb "monopoly" by insurance *companies* of "all kinds of insurance involving automobiles" [13]—a wholly irrational afterthought exposed

[11] Sections 6346-17 to 6346-27, found on pp. 157-161 of the 1951 Supplement to Page's Ohio General Code Annotated and on pp. 93 to 96 of Throckmorton's Ohio Code, Annotated, Baldwin's Permanent Service, 1948-1952. Sec. 6346-19 provides in part that: "• • • No provision of this act shall be construed to authorize anyone other than a licensee of the division of insurance to directly or indirectly receive any part of the amount charged for insurance in connection with any retail installment sale". Sec. 6346-22 provides in part: "• • • Provided, further, that any compensation received by the retail seller as commission received by him from an insurance company as its licensed agent, shall not be deemed or construed as a benefit received by the retail seller out of the insurance charge to the retail buyer under the installment contract. • • •"

[12] Section 9589-5, referred to in note 8, *supra*, forbids any dealer or finance company to make the taking of insurance in a particular company or from a particular agent a condition precedent to the sale or financing of property. Besides providing criminal penalties, it requires the Superintendent of Insurance to "revoke the insurance license of any • • • agent • • • who violates" it.

[13] The recognized public evil involved in the statute upheld in the *Daniel* case was "the beneficiary's tendency to deliver the policy's proceeds to the agent-undertaker for whatever funeral the money will buy, whether or not an expensive ceremony is consistent with the needs of the survivors" (336 U.S. 220, pp. 222-3). This evil did not flow from any "advantageous position" of the undertaker *qua* insurance agent "to effect such insurance", nor was the case concerned with "monopoly" of insurance.

by the very framework of Sections 644 and 644-3 themselves, as well as by the total irrelevancy of the *principal use* limitation to the question of actual or potential use of any means, legal or illegal, to achieve a "monopoly" in the sale of insurance for the agent's company. If, for example, the Common Pleas Court means to imply that such a "monopoly" might be achieved illegally by means of "tie-in" devices, the principal use test of the statutes is obviously neither a cure nor a preventive of such conduct. Moreover, the language in question first appeared in the statute (Sec. 644) in 1935 (see 116 O.L. 240) when, as is well known, there was no scarcity of automobiles which could afford an opportunity for "tie-in" practices. Indeed, the statutes do not so much as mention "automobiles". Finally, in Ohio people are not licensed "to do a general insurance business"; under Section 644 they are licensed to represent a company only "for the transaction of such business as it is authorized to transact".

Due Process of Law

Appellants fully appreciate the heavy burden resting "upon one who would persuade * * * [the United States Supreme Court] to use the due process clause to strike down a substantive law". They recognize that the police power " 'extends to all the great public needs' " and that its utilization "in aid of what the legislative judgment deems necessary to the public welfare * * * is peculiarly apt when the business of insurance is involved—a business to which the government has long had a 'special relation' ", "State regulation of the insurance business * * * [having been] upheld in a wide variety of circumstances against the claim that the law violated * * * Due Process * * *". *California State Automobile Ass'n., etc.* v. *Maloney*, 341 U.S. 105, 109; and see *Daniel* v. *Family Security Life In-*

surance Co., 336 U.S. 220, 224-5 (footnote). They are fully cognizant of the "pronounced shift of emphasis" (*id.* at p. 225), evidenced by *Nebbia* v. *New York*, 291 U.S. 502, which has occurred in due process philosophy concerning a state's legislative efforts in the "public welfare" to remove "injurious practices in their internal commercial and business affairs". *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 536. They appreciate the force of the Court's statement in *Breard* v. *Alexandria*, 341 U. S. 622 (at pp. 632-3) that:

> "• • • even a legitimate occupation may be restricted or prohibited in the public interest. See the dissent in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 280, 303. The problem is legislative where there are reasonable bases for legislative action."

Nor do appellants question the well-established presumption of constitutionality of statutes.

But—appellants are here asking the Court to strike down a construction and application that leaves nothing to imagination and presumption; that frankly subverts Sections 644 and 644-3 of the Ohio General Code to the promotion solely of private competitive, as distinguished from public, purposes and to the preferment of the economic interests of one group to those of another; that harms the interests of the automobile insuring public without striking at any public evil or tendency toward evil; and that reduces the statutory means (the principal use limitation) to an inherently irrational absurdity considered as a device "to prevent an unfair advantage in the placing of insurance and the licensing of persons who were not intending to do a general insurance business, but simply to supplement their primary business of selling automobiles". The "pronounced shift of emphasis" does not touch these abiding deficiencies which are clearly recognized as such in all cases.

In many earlier decisions the Supreme Court of the United States has held unconstitutional under the due process clause state action which accomplishes an invasion of an individual's right to pursue a lawful business and which favors solely his entrenched competitors without being referable to any public evil. See e.g., *Butcher's Union Slaughter-house, etc.* v. *Crescent City Live-stock, etc. Co.*, 111 U.S. 746; *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (and dissenting opinion of Mr. Justice Holmes at pp. 114-117); *Smith* v. *Texas*, 233 U.S. 630; *Fidelity & Deposit Co. of Maryland* v. *Tafoya*, 270 U.S. 426; *Treigle* v. *Acme Homestead Ass'n.*, 297 U.S. 189; *Northwestern National Insurance Co.* v. *Lee*, 49 F. (2d) 274 (aff'd. *sub nom.*, *Averill* v. *Northwestern National Insurance Co.*, 284 U.S. 590). Cf. *Lawton* v. *Steele*, 152 U.S. 133, 136-7. And see *Hauser* v. *North British Mercantile Insurance Co.*, 206 N.Y. 455, 100 N.E. 52; *Northwestern National Insurance Co.* v. *Fishback*, 130 Wash. 490, 228 Pac. 516.

In all recent cases in which the due process clause has been invoked, the statutes were patently aimed at clear-cut public evils, plainly discernible from the statutes themselves and so acknowledged and described in the opinions. The Court found that the state legislatures' judgments regarding the existence of such public evils were not unwarranted and that the legislative means were rationally related to their elimination or reduction. See e.g. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 534; *Railway Express Agency Co.* v. *New York*, 336 U.S. 106, 109, 110; *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 222-224, and *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 547-551.

In this case the construction and application sanctioned by the Ohio courts is so restrictive under the circumstances as practically to exclude automobile dealers from licensure

as insurance agents, and *that*, rather than the words of the statutes (which are fair enough on their face) is what appellants conceive to be a denial of due process of law. But as has been shown, other Ohio statutes plainly recognize the propriety of a seller of goods being licensed as an insurance agent, and placing insurance on the goods sold; so that it can not be said that the result of the decisions appealed from cures or obviates something of which the legislature must have conceived as an evil. Neither in fact nor by assumption can the construction and application of the statutes herein questioned be justified as an exercise of legislative judgment concerning any objective whatsoever other than the preference of one group of competitors over another.

In many cases decided under the Commerce Clause state licensing statutes which discriminate against non-residents solely for the benefit of their local competitors have been declared void. Such considerations of favoritism are unlawful by whatever standard judged. See e.g. *Best & Co.* v. *Maxwell*, 311 U.S. 454, 456-7; *Nippert* v. *City of Richmond*, 327 U. S. 416, 433-4 (footnote). As stated by the Chief Justice, dissenting in *Breard* v. *Alexandria*, 341 U.S. 622 (at p. 647):

> "In passing upon other ordinances affecting solicitors, this Court has not hesitated in noting the economic fact that 'the "real competitors" of [solicitors] are, among others, the local retail merchants.' "

See also, *Pennsylvania* v. *West Virginia*, 262 U.S. 553; *Buck* v. *Kuykendall*, 267 U.S. 307, 315-6; *Baldwin* v. *Seelig*, 294 U.S. 511; and *Hood & Sons* v. *DuMond*, 336 U.S. 525.

Even if some undisclosed public purpose could be assumed in support of the construction and application of the phrase "upon * * * property * * * for which * * * the appointee * * * is * * * vendor" as referring to insurance

covering the dealer-agent's car purchasers, the manner in which the Superintendent applies—and is authorized by the decisions below to apply—the principal use standard is so irrational, capricious and arbitrary as to condemn it because violative of both the due process and equal protection principles. In other words, whatever the type of business contemplated by the quoted phrase, the Superintendent's method of applying the principal use standard is arbitrary and capricious as well as irrational as a means "to prevent an unfair advantage". By thus misconceiving the true identity of the restricted class of business and by his arbitrary application of the principal use standard, the practical result of the Superintendent's action is doubly harsh.

The Superintendent takes the agent's "production record" listing policies effected through him during some arbitrarily selected period of time and showing those issued to the dealer-agent's car purchasers and those issued to others. (Unsuccessful solicitations are not counted.) If the former outnumber the latter, the agent's license is revoked or not renewed. (And since the anticipated production of a dealer-applicant for a first-time license is believed likely to show such an excess, licensure is refused.)

The purely mathematical result of such a count thus depends upon the period covered by the record, irrespective of whether or not that period is of sufficient length for the adequate demonstration of any properly proscribed principal use and discretionary assessment of probable future conduct. And assuming the proscribed class of business to be that of the dealer-agent's car purchasers and the purpose of the restriction to be the prevention of "an unfair advantage in the placing of insurance" at a time when the agent is "in an especially advantageous position to place the insurance", what rational relationship is there between

the principal use means and the prevention of any such advantage, fair or unfair? The gist of the challenged construction is that it *compels* successful solicitation of a preponderant quantum of "outside" business as a condition of doing the "inside" business; it does not prohibit or even regulate the "inside" business.

The arbitrary nature of the restriction as applied by the Superintendent affects a whole class—automobile dealers and their employes—and is not merely burdensome in isolated instances. Its effect is to destroy a business opportunity of benefit to the insuring public as well as to automobile dealers without preventing or reducing any public evil.

Equal Protection of the Law

The Superintendent's construction and application of the statutes likewise violates the equal protection principle. It is fundamental that a State may discriminate in its police regulations only where the discrimination is based upon a reasonable classification. To be reasonable the differentiation must, pragmatically, be "fairly related to the object of regulation" (*Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110, 112): It "must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect of which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis". *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417. As stated in *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144 (per Mr. Justice Holmes): "The question is a practical one dependent upon experience."

Here, the admitted practical effect of the Ohio statutes, as construed and applied, is, first, to create an occupational class against which there is discrimination. Automobile dealers and their employes are denied insurance licenses on

a ground related solely to their "primary business of selling automobiles", as well as by means of a test which almost inevitably excludes them on that ground. As a practical matter the class is closed. This practical exclusion is accomplished by a classification which has no reasonable or rational relationship to any legitimate purpose of the licensing laws. The pretext for it given in the opinion of the Common Pleas Court (that at "the time the [car] sale is consummated" the automobile dealer-agent is in "an especially advantageous position to place the insurance" and thereby enjoys "an unfair advantage") is not a legitimate public purpose, and even if it were, the principal-use test is obviously wholly irrational as a means to "prevent" any such "unfair advantage in the placing of insurance."

A further unwarranted discrimination which is a practical consequence of the Superintendent's construction and application of the statutes and of his conception of what constitutes the restricted class of business, is the discrimination thereby made in favor of dealer-agents who, for any reason, such as a sufficient prior engagement in the insurance business and consequent possession of an insurance clientele, would find it practicable to overmatch the business done with their car purchasers by that done with others. The petition states that three of the licensed agents of Motors Insurance Corporation are in such a preferred class (pars. 7 and 17). This circumstance dramatically exposes the arbitrary impact of the statutes, as construed and applied, and the lack of any rational or reasonable relation of the resulting classifications to any discernible public purpose of a licensing law. Were a dealer-agent successful in selling insurance to every one of his automobile purchasers, yet had sold a larger number of policies to his "outside" clientele, he would not run afoul of the law as so construed. The relatively small dealer selling only 100 new cars a year but insuring each of the purchasers or a ma-

jority thereof, would be in violation of the statutes as construed whereas a large dealer selling 1,000 cars annually who sold insurance to many of his car purchasers yet sold more insurance to his "outside" clientele would not be in violation of the statutes as construed. Thus, the agent's production record is a wholly irrational criterion for fixing the line of demarcation between the class of dealer-agents that possesses a so-called "unfair advantage in the placing of insurance" and the class of dealer-agents which supposedly is not so advantageously situated: By definition, the "especially advantageous position to place the insurance" exists on both sides of the line at all times. It exists just as much in a single transaction involving the sale of automobile insurance to a dealer-agent's car customer as it does in any number or percentage of such transactions. Cf. *Engel* v. *O'Malley*, 219 U.S. 128, 137-8 (Mr. Justice Holmes: " • • • where size is not an index to an admitted evil the law cannot discriminate between the great and small"). If it be argued that the Common Pleas Court does not equate "an especially advantageous position to place the insurance" with "an unfair advantage in the placing of insurance," but that the advantage only becomes "unfair" when the business derived from such solicitation constitutes the principal use of the dealer-agent's license, what process of reasoning can account for this qualitative change from fairness to unfairness? "Unfair" to whom? Agents not so advantageously situated are the only conceivable beneficiaries of such a concept of "unfairness."

Conclusion

The questions of due process of law and equal protection of the laws may be summarized thus:

Does State action, under color of a State statute, which, by reason of admitted and known facts concerning (1) the manner in which and the circumstances under which auto-

mobiles are sold and their purchasers are insured against physical damage to and loss of the vehicle, and (2) the manner in which an insurance clientele is built up, denies to automobile dealers the right, open to others, of being licensed and acting as agents of a company writing such insurance, deprive them of their property and liberty without due process of law, or deny to them the equal protection of the laws, or both?

Even assuming that the average automobile dealer, if newly licensed as an insurance agent, could develop an "outside" insurance clientele soon after becoming licensed, what benefit to the insuring public could be served by requiring him to abstain from attempting to sell insurance to one purchaser of a car from him until, as insurance agent, he had first sold insurance to another person not in that class—both purchaser and agent meanwhile losing the benefit of the insurance transaction? Does such a restriction, even if surmountable, deprive automobile dealers of property and liberty without due process of law, or deny to them the equal protection of the laws, or both?

It is respectfully submitted that the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Ohio and decide these important and substantial questions.

Respectfully submitted,

CLARENCE D. LAYLIN,
J. RATH CRABBE,
Attorneys for Motors Insurance Corporation, The Avondale Motor Car Company and John L. Cashman, Appellants.

Dated: July 1, 1952.

EAGLESON & LAYLIN,
BALLARD, DRESBACH & CRABBE,
Of Counsel.

APPENDIX A

Motors Ins. Corp. et al., Appellants v. Robinson, Supt., et al., Appellees. (No. 32938—Decided March 19, 1952.) Appeal from the Court of Appeals for Franklin County.

Messrs. Eagleson & Laylin and Messrs. Ballard, Dresbach & Crabbe, for appellants.

Mr. C. William O'Neill, attorney general, Mr. Ralph Klapp & Crabbe, for appellants.

Mr. C. William O'Neill, attorney general, Mr. Ralph Klapp and Mr. Don W. Montgomery, for appellees.

It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

Weygandt, C.J., Zimmerman, Middleton, and Matthias, JJ., concur.

APPENDIX B

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 4614

MOTORS INSURANCE CORPORATION, et al., *Plaintiffs-Appellants,*

vs.

WALTER A. ROBINSON, as Superintendent of Insurance of Ohio, et al., *Defendants-Appellees*

Opinion

Rendered on the 23rd day of October, 1951

Messrs. Eagleson & Laylin, 16 East Broad Street, Columbus 15, Ohio,

Messrs. Ballard, Dresbach & Crabbe, 8 East Broad Street, Columbus 15, Ohio, for Plaintiffs-Appellants.

Hon. C. William O'Neill, Attorney General; Mr. Ralph Klapp, Assistant Attorney General; State House Annex, Columbus 15, Ohio, for Defendants-Appellees.

By the COURT:

This is a law appeal from the judgment of the Common Pleas Court construing General Code Sections 644 and 644-3 and also holding that the same is not in violation of Article I, Section 2 of the Constitution of Ohio, and of the Fourteenth Amendment to the Constitution of the United States.

We have examined the well-considered opinion of Judge Reynolds and are in accord with the logic and legal conclusions contained therein.

Finding no error in the record, the judgment will be affirmed.

Hornbeck, P.J., Wiseman and Miller, JJ., concur.

APPENDIX C

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 180,447

MOTORS INSURANCE CORPORATION, et al., *Plaintiffs*,

vs.

WALTER A. ROBINSON, Supt. of Insurance, et al., *Defendants*

Decision

Rendered this 22nd Day of March, 1951

REYNOLDS, *J.*:

This case is before the court on defendants' demurrer to plaintiffs' petition.

In this action plaintiffs seek to enjoin defendants from refusing to grant insurance agents licenses to persons nominated by Motors Insurance Corporation or from re-

fusing to admit such persons to examinations to determine their qualifications to be licensed as insurance agents or from refusing to renew insurance agents licenses held by the individual plaintiffs and those whom they represent, or from revoking licenses upon the ground that the principal use of such licenses has been, is, or will be to procure insurance covering solely the interests of persons, firms or corporations other than such licensees or their employes or employers in motor vehicles which such licensees or their employer, or employers, have sold or are selling.

The petition recites that Motors Insurance Corporation is a corporation, under the laws of the State of New York and engaged in the business of insuring against the risks of physical damage to and theft of motor vehicles, and is conducting said business in the State of Ohio, among other places through licensed agents, who in the main are connected with the business of motor vehicle sales; that it has complied with all the laws of Ohio relative to foreign insurance companies, other than life, engaged in business of the kind herein described; that it was authorized to transact such business in Ohio by a certificate of authority issued to it by the Division of Insurance, Department of Commerce of the State of Ohio on May 9, 1940, which certificate has been renewed annually; that pursuant to such certificate Motors Insurance Corporation has transacted such insurance business in Ohio since September 1948, as of which date agents appointed by it, were first licensed as insurance agents by said Division of Insurance, acting through the then Superintendent of Insurance of Ohio; that since said date 935 individuals and 247 corporations have been appointed by said Motors Insurance Corporation and licensed by said Division of Insurance as agents of said corporation in Ohio, and at the present time there are approximately 912 such individual agents and that all of said corporations and approximately 863 such individuals are either motor vehicle dealers or officers or employes of such dealers and are doing business in approximately 454 different locations in Ohio; that the remaining agents are employes of plaintiffs' branch offices in Ohio whose duties are substantially limited to receiving and forwarding appli-

cations procured by other licensed agents, and that all of said agents have met all the qualifying requirements for the issuance and renewal of licenses to act as insurance agents as provided by Sec. 644 of the General Code of Ohio; that plaintiff, The Avondale Motor Car Company, is a corporation under Ohio laws, with its principal place of business in Cincinnati, and is a dealer in motor vehicles, and is also licensed to procure applications for insurance in Ohio, as agent of Motors Insurance Corporation, pursuant to license issued in September, 1948, by the Superintendent of Insurance, on the requisition of said Motors Insurance Corporation, which license was renewed on July, 1949, and is now in full force and effect; that plaintiff, Fred Kahn, is engaged in business as a dealer in motor vehicles, at Lebanon, Ohio, and holds a license issued by the State of Ohio, to procure insurance as agent of plaintiff; that plaintiff John L. Cashman is an employe of The Winders Chevrolet Company, an Ohio corporation, with its principal place of business in Columbus, where it is engaged in the business of dealing in motor vehicles, and that the said Cashman holds a license to procure applications of insurance as agent of Motors Insurance Corporation, pursuant to a license issued by the State of Ohio on the requisition of Motors Insurance Company, which said license is in full force and effect; that plaintiffs bring the action on behalf of themselves and the representatives of the class above described, who are similarly situated and who would be similarly affected by the threatened actions complained of, and that there is a community of interest among the plaintiffs and the other said representatives of Motors Insurance Corporation above referred to; that defendant Walter Robinson is the duly qualified and acting head of the Division of Insurance within the Department of Commerce of the State of Ohio, with the title of Superintendent of Insurance; that defendant Robert L. Moulton is the duly appointed and qualified Director of Commerce of the State of Ohio, and as such, authorized to exercise the powers vested by the laws of Ohio in said department, including all powers invested in the office of the Superintendent of Insurance; that the actions

and threatened actions of which complaint is made herein have been and presumably will be taken and done in the name of the Superintendent of Insurance by defendant Walter A. Robinson under the authorization and with the approval of defendant Robert L. Moulton; that a very considerable proportion of the sales of motor vehicles by practically all dealers in the State of Ohio are transactions in which payment of the larger part of the purchase price is made in deferred installments. Generally, however, the dealer is not equipped to handle these transactions himself and must arrange for the financing thereof with some financial institution or institutions which generally require either a legal lien upon or a legal interest in the vehicle and insurance against physical damage and theft of the vehicle; that in case of deferred payments the cost of insurance is added, a chattel mortgage is given to the seller to secure the payments, and this is assigned to the institution financing the transaction, and the insurance premium is paid by it to the insurer; that the agents of plaintiff Motors Insurance Corporation, solicit and place the insurance incidental to such sales, but may not make the placement of such insurance with the said Motors Insurance Corporation a condition of such sales or such financing, an option of procuring such insurance through an agent and in a company of the purchaser's choice being given each purchaser, *but in most cases purchasers have elected to insure with said Motors Insurance Corporation.* (Italics ours.)

In addition to the above described insurance placed by plaintiffs' agents, they also placed damage and theft insurance on vehicles sold for cash by the dealer with whom or which the agent is connected; on vehicles not sold by the dealer with whom the agent is connected, and on renewal policies on vehicles whether or not originally sold by the dealer with whom the agent is connected; that the insurance so written covers only the retail purchaser or owner but subject to any known lien or interest; that in no instance has any agent placed any insurance on vehicles owned by such agent or his employer, and the entire premium cost is borne solely by the retail purchaser or owner;

that defendants have determined that if a majority or some other substantial number of policies of insurance placed in Ohio pursuant to a license issued under Sec. 644 G. C. by a person engaged in Ohio in the motor vehicle sales business cover motor vehicles which had been sold by such person or his or its employer or employes, then it is the duty of the Superintendent of Insurance to revoke or to refuse to grant or to refuse to renew such license, even though none of such policies has insured or would insure any interest of such person or employer as seller, and even though the entire premium cost of such insurance is or would be borne solely by the retail purchaser or owner of the motor vehicle.

The petition further alleges that defendants' interpretation of the statute involved, to-wit: G. C. 644-3 and related statutes, is incorrect, and that the practical effect of their enforcement as interpreted by defendants would be to destroy the insurance business of plaintiff in Ohio and would exclude persons connected with the business of selling motor vehicles from engaging in such insurance business in Ohio; and that unless enjoined, defendants will revoke existing licenses and refuse to renew or issue new licenses to agents representing plaintiffs, and which acts are and would be unconstitutional and result in irreparable loss.

The prayer of the petition is that defendants be enjoined from enforcing Sections 644 and 644-3 of the General Code of Ohio as thus interpreted, to-wit: from refusing to grant insurance licenses to persons otherwise qualified on the nomination of Motors Insurance Corporation, or from refusing to admit such persons to examinations to determine their qualifications to be licensed as insurance agents, or from refusing to renew licenses held by plaintiffs and those whom they represent, or from revoking such licenses, upon the sole ground that the principal use of such licenses has been or is or will be to procure, receive, forward, solicit, place or effect insurance covering solely the interests of persons, firms or corporations other than such licensees or their employes or employers on motor vehicles which such licensees or their employes or employers have sold or are selling.

Defendants filed a demurrer to the petition on the ground that it does not state facts sufficient to show a case of action and the case is now before this court on said demurrer.

The case has been argued at length and both sides have filed extensive briefs which the Court has read and re-read before coming to a conclusion on the questions involved, which in substance are these, namely, Do sections 644 and 644-3 of the General Code of Ohio inhibit the licensing of the persons by whom and on whose behalf this action is brought, and if so, are the statutory provisions invalid as being violative of the constitutional provisions of the State of Ohio and the United States.

The statutes in question are G.C. Secs. 644 and 644-3 which provide as follows:

"644. Agent's license issued, when; notice of appointment; contents, revocation or cancellation of license; renewal; review; exceptions.

"No person shall procure, receive, or forward applications for insurance unless a resident of this state and duly licensed by the superintendent of insurance. Upon written notice by an insurance company authorized to transact business in this state of its appointment of a person to act as its agent the superintendent of insurance, if he is satisfied that the appointee is a suitable person and intends to hold himself out in good faith as an agent; that appointee is honest, trustworthy and understands the duties and obligations of an agent and is familiar with the insurance laws of the state and with the terms and provisions of the policies and contracts of insurance he proposes to effect; that in applying for such license it is not appointee's purpose or intention principally to solicit or place insurance on appointee's own property or that of relatives, employers or employees or that for which they or the appointee is agent, custodian, vendor, bailee, trustee or payee, shall issue to appointee a license which shall state in substance that the company is authorized to do business in this state and that the person named therein is a constituted agent of the company in this state for the transaction of such

business as it is authorized to transact therein. Such appointee, if he has not theretofore held a license as an insurance agent in this state, shall be required to submit to a hearing and examination as to the above qualifications. Such notice by an insurance company of its appointment of an agent shall be upon a form furnished by the superintendent of insurance and shall be accompanied by a statement under oath by the appointee which shall give appointee's name, age, residence, present occupation, occupation for the five years next preceding the date of the notice and such other information, if any, as the superintendent of insurance may require, upon a blank furnished by him. Such examination and hearing shall be held and decision rendered by the superintendent of insurance within thirty days from date of application for license. The superintendent of insurance, after the granting of such license, for cause shown, and after a hearing, may determine any persons to be appointed, or any person heretofore appointed as agent to be unsuitable to act as such agent, and shall thereupon revoke such license, and notify both the company and the agent of such revocation. Unless revoked by the superintendent of insurance or unless cancelled by him on written notice from the company or the agent that the agent's authority to act for the company has been terminated by the company, such license and any other license issued to an agent or any renewal thereof shall expire on the 30th day of June next after its issue. But any license issued and in force when this act takes effect or thereafter issued, may, in the discretion of the superintendent, be renewed for a succeeding year or years by a renewal certificate without the superintendent's requiring the detailed information required by this act. A foreign or alien insurance company shall pay a fee of two dollars for every such license and for each renewal thereof.

The action of the superintendent of insurance in granting, revoking, renewing or refusing to grant, revoke or renew such license shall be subject to review

in accordance with the provisions of the administrative procedure act.

An insurance company shall be bound by the acts of the person named in the license within his apparent authority as its agent.

This section shall not apply to life insurance companies, including fraternals nor to domestic mutual protective assessment fire associations as defined in section 9593 of the General Code nor effect the provisions of section 644-2 thereof."

"644-3—When license shall be refused or revoked.—It shall be the duty of the superintendent of insurance to withhold any license applied for or revoke any license to any agent, solicitor or broker when he is satisfied that the principal use of such license is to effect insurance upon the property of such agent, broker or solicitor, or to evade or violate the provisions of section 9589-1."

Counsel for plaintiffs argue at length about the ambiguities and grammatical faults of these sections, as a result of which the intention of the legislature is at best difficult to determine, but that in the last analysis the conclusion as to the legislative intent is that it was to prevent the obtaining of insurance at discriminatory rates.

As supporting this theory, a comprehensive history of the various legislative enactments governing the insurance business is indulged to indicate a continued and consistent purpose to prohibit rebating and otherwise discriminatory practices in connection with insurance premiums.

The State of Ohio first began to supervise and regulate the insurance business in this state when it organized a separate department and provided for a Superintendent of Insurance and made it unlawful for any person or company to engage in the insurance business unless licensed by the said superintendent.

In 1910 the legislature enacted what is substantially now G. C. 9589-1 which prohibited rebates or other special favors as an inducement to secure insurance.

In the case of State v. Conn, 110 O. S. 405, the Supreme Court stated that

> "the purpose of the fire insurance act (G. C. Sec. 9589-1) was to prevent discrimination as to rates directly or indirectly by the insurer between its insured, and that it has not for one of its purposes the prevention of competition between insurance companies as to the rate which each may charge."

In 1917 the Legislature amended 644 and also enacted G. C. 644-1, 644-2, 644-3 and 644-4.

G. C. 644-3 provided for the revocation or withholding of a license by the Supterintendent of Insurance when he is satisfied that the principal use of such license was to effect insurance upon the property of the licensee or applicant for a license.

The purpose of this statute would appear to be that licenses shall not be granted to persons who were not intending to use the same for the general insurance business, but rather for their own individual benefit, since by the provisions of G. C. 9589-1, a duly authorized agent was entitled to the regular commission on policies of insurance on his own property, the insurance covering which he himself effected.

The following is the wording of G. C. 644-3 as originally enacted in 1917:

> "Section 644-3. It shall be the duty of the superintendent of insurance to withhold any license applied for, or revoke any license to any agent, solicitor, or broker when he is satisfied that the principal use of such license is to effect insurance upon the property of such agent, broker or solicitor, or to evade or violate the provisions of Section 9589-1 of the General Code."

The statute remained in this form until amended in 1949 and which amended statute has been heretofore set forth.

While the amendment is perhaps needlessly verbose and should not be held up as an example of the best English or grammatical perfection, yet it seems clear that the legislature intended to add to the reason for refusing to grant or

renew licenses or for revoking one already issued, that the principal use was to effect insurance upon the property of the licensee, the further provisions that the principal use also included property of relatives, employers, employees, or the property for which the licensee, relatives, employers or employees, is or are agent, custodian, vendor, bailee, trustee or payee.

It is the contention of plaintiffs that even should the statute be construed most unfavorably to them, that the restriction as to the insurance involving property for which certain named persons are vendors, that it could refer only to the time that the named persons held the property either actually or theoretically and that as soon as the property was sold and the property belonged to the purchaser, the restriction no longer applies.

In other words it is desired to construe the restrictive provisions of the statute as relating to insurable interests of the licensees, their relatives, employers, etc.

If this had been the intention of the legislature a great deal of trouble was indulged to express a simple purpose, and which could have been simply and directly stated.

Nor can the Court agree that the primary purpose of the legislative enactment was to further lessen the chances of rebating or the affording of unfair advantages to persons insured, and to accomplish this the legislature was narrowing still further the field of activity of the licensee.

In view of the provisions of G. C. Sec. 9589-1 which specifically prohibits rebating or other special favors or inducements to secure insurance, and provides for the revocation of licenses in cases of violations, the query naturally arises why there should be any necessity for a statutory provision curtailing an agent's activities for fear of his violating this statute.

The absolute guaranty that there would be no violation of Sec. 9589-1, would be, of course, to inhibit the licensee from writing any insurance, which of course leads to an absolute absurdity, toward which the suggested legislative purpose is at least a small step.

Prior to 1935 about the only conditions precedent to the granting of a license to a person affording him the right

to act as an insurance agent were that some insurance company authorized to transact business in this state give a written notice to the superintendent of Insurance of appointment of such person as agent, and the superintendent be satisfied that the appointee is a suitable person and intends to hold himself out in good faith as an agent.

In 1935 G. C. 644 was amended, setting out the further conditions, that before the Superintendent should issue a license that he should be satisfied *that the appointee "is honest, trustworthy and understands the duties and obligations of an agent and is familiar with the insurance laws of the state and with the terms and provisions of the policies and contracts of insurance he proposes to effect; that in applying for such license it is not appointee's purpose or intention principally to solicit or place insurance on appointee's own property or that of relatives, employers or employes or that for which they or the appointee is agent, custodian, vendor, bailee, trustee or payee.*" (Italics ours.)

Subsequent to this enactment the interpretation placed on the added conditions precedent to the issuing of licenses, was that they precluded automobile salesmen since presumably they would use their licenses to insure automobiles sold and being sold by their employers.

In the case of Motors Insurance Corporation vs. Dressel, 80 Oh. App. 505, decided in our own Court of Appeals, the Court held that the Superintendent of Insurance could not add to the qualifications or conditions for an insurance agent's license and that automobile salesmen could not be denied licenses simply for that reason.

This case affirmed the decision of Judge Leach in this court and in the case of Automobile Insurance Agency v. Lloyd, 36 O. L. A. 448, the same judge held that where the applicants had the qualifications set out in G. C. 644 and

> "Intend to hold themselves out in good faith as insurance agents * * * there is nothing to show that it is their purpose and intention principally to solicit or place insurance on their own property or that of relatives, employers or employees, or that for which they or the appointee is agent, custodian, vendor, bailee, trustee or payee,"

they were entitled to be licensed.

After the decision in the Dressel case, supra, the Motors Insurance Corporation filed applications for numerous persons connected with General Motors Automobile dealers, and the Superintendent of Insurance held hearings to determine whether or not the applicants intended to use their licenses principally in connection with automobiles sold by agencies with which they were connected, and in granting the licenses the superintendent found from the evidence that the applicants expected to secure most of their business from persons other than their own or employers' customers.

It clearly appears, therefore, that the interpretation placed on the added provisions of G.C. 644 made in 1935, was that there was a restriction against licensees placing insurance on motor vehicles sold by them or their employers, and this restriction was not limited to or determined by the vendor's interest, but was intended to apply to those transactions where the licensee or his employer had actually sold the particular automobile involved.

The purpose of the restriction was undoubtedly intended to prevent an unfair advantage in the placing of insurance and the licensing of persons who were not intending to do a general insurance business, but simply to supplement their primary business of selling automobiles.

This having been the interpretation of the provisions of G. C. 644, prior to the amendment of 644-3 when the added provisions for revocation were incorporated which were in effect those provisions of G. C. 644 added in 1935, it is concluded by the Court that the Legislature intended the same interpretation of the amended section 644-3 and that the restrictions with respect to insurance on property of which the licensee or his employer is the vendor applies to the time the sale is consummated, and the licensee is in an especially advantageous position to place the insurance.

This leaves then the question whether the statute so interpreted is violative of any constitutional right.

In this connection it must first be noted that it is generally recognized that the insurance business is one vested with a public interest and as such properly subject to government control.

See Verducci vs. Casualty Co., 96 O. S. 260.

Such being the case the right to engage in the insurance business is not an absolute right but a privilege accorded by the state granted upon specified terms and conditions. The restrictive provisions therefore in connection with the granting of licenses for selling insurance are not the deprivation of property nor do they afford special privileges. On the contrary, they seek to avoid special privileges being enjoyed or of which special advantage may be taken.

Counsel for plaintiff have cited numerous cases in support of their theory that legislative regulation of business is unconstitutional, most of which cases are readily distinguishable on the facts and will not be individually discussed.

The case most nearly comparable to the instant case is that of Houser vs. North British and Mercantile Title Insurance Co., 206 N. Y. 455, in which the New York Court held invalid a statute requiring an applicant for an insurance license to file an application stating that he "is engaged or intends to engage in good faith principally in the insurance business, or that he conducts or intends to conduct such business in connection with a real estate agency or real estate brokerage business."

The question naturally arises as to why an agent might not conduct an insurance business in connection with other business than the real estate business, and it is apparent that the law did not have a general application.

The syllabus of that case is as follows:

> "A statute under the guise of an exercise of the police power cannot arbitrarily interfere with that liberty of pursuit; the equal protection of the laws means equality of opportunity to all in like circumstances, and classification to be valid must not be arbitrary and discriminate against persons without a basis in reason."

In its opinion the Court said:

> "We may readily concede that, as a measure regulative of a business pursuit, which, from the extent to which it is carried on, is presumably, affected with a

public interest, the requirement by the Legislature of a license would not be an unreasonable exercise of power. That would afford an opportunity for inquiry into antecedents and fitness of character, and be a reasonable enough precaution in the public interest. But the Legislature has prescribed in this statute a condition for the issuance of the license, which is a purely arbitrary restriction. There is no good reason, and no public interest can, conceivably, be subserved in prohibiting persons from conducting the business of an insurance agent or broker, in connection with any other lawful business, or occupation in which they may be engaged."

This distinguishes that case from the instant one, where the restriction is general and not of limited application since it is referable to any kind of business.

The statute under consideration does not deprive any class, group or individual from securing an insurance license if he has the necessary qualifications and intends to use his license to conduct a general insurance business, qualified only by the provision that the license is not to be used primarily to effect insurance on his own property, or that of relatives, employees, employers, or that for which they or the licensee are or is agent, custodian, vendor, bailee, trustee or payee.

It, therefore, cannot be successfully maintained that the effect of the statute is to deprive any one from the right or ability or opportunity to secure a license to sell insurance.

In the case of Daniel vs. Family Security Life Insurance Co., 336 U. S. 220, the Supreme Court of the United States upheld the validity of a South Carolina statute forbidding undertakers to serve as life insurance agents.

From a reading of the Court's opinion and the note appended, containing reasons advanced before the legislative Committee when the law was under consideration, we must come to the conclusion that the law was aimed at the possible evil of a monopolistic control of a certain kind of life insurance, providing among other benefits, the payment of funeral expenses, for the reason that undertakers

would be in an advantageous position to effect such insurance.

The same argument was pressed in that case as is now voiced, namely, that an insurance lobby had secured the passage of the law, and the Court properly held that it was not equipped to decide the desirability of the law. The reasons inducing the legislation are immaterial, if a valid statute is enacted into law.

In the instant case it is not difficult to see that if automobile salesmen may be licensed as insurance agents without restriction or limitation, the effecting of all kinds of insurance involving automobiles could conceivably and reasonably become in theory, if not in fact, a monopoly controlled by that company or companies which were successful in having the automobile agents licensed to sell their insurance.

The prevention of such an eventuality could well have been the purpose of the legislature in enacting the law under consideration, which the Court determines is not in contravention with any of our state or national constitutional provisions.

Counsel stress the provision of the statute with respect to the word "solicit" and point out the difficulty of determining the percentage of solicitation as between the general public, and the restricted classes. The Court is of the opinion that this question will present little or no difficulty, and that only those solicitations which result in effecting insurance will be regarded. In other words, the word "solicited" is to be regarded as related to and to be interpreted with "place and effect", and a mere solicitation without method effecting any insurance would be disregarded.

After all, it is only the insurance actually placed which can give the superintendent any accurate information as to whether there has been any violation of the licensee's promise that his purpose is not principally to insure his own property and that of relatives, employers or employees or that for which they or he is vendor, etc.

Any abuse of discretion on the part of the Superintendent of Insurance in refusing to issue licenses because of any

questions relating to the insurance of property of which the licensee or his employer is vendor, is subject to review or correction by the courts, so that the agents' or prospective agents' rights are properly guaranteed.

The fact that a law may be difficult of application or the subject of administrative abuse does not of itself make the law invalid.

For the reasons stated, the Court has determined that the petition does not state facts sufficent to constitute a cause of action and therefore defendants' demurrer is sustained.

(S.) REYNOLDS,
Judge.

Appearances:

EAGLESON & LAYLIN,
Attorneys for Plaintiffs.
ATTORNEY GENERAL OF OHIO,
Attorney for Defendants.

FILED
JUL 31 195
CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 241

MOTORS INSURANCE CORPORATION, A CORPORATION, THE AVONDALE MOTOR CAR COMPANY, A CORPORATION, FRED KAHN, AND JOHN L. CASHMAN, FOR THEMSELVES AND OTHERS SIMILARLY SITUATED,

Appellants,

vs.

WALTER A. ROBINSON, AS SUPERINTENDENT OF INSURANCE OF OHIO, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

C. WILLIAM O'NEILL,
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ROBERT E. LEACH,
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Assistant Attorney General;
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Counsel for Appellees.

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IN THE SUPREME COURT OF OHIO

No. 32938

MOTORS INSURANCE CORPORATION, A CORPORATION, THE AVONDALE MOTOR CAR COMPANY, A CORPORATION, FRED KAHN, AND JOHN L. CASHMAN, FOR THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

vs.

WALTER A. ROBINSON, AS SUPERINTENDENT OF INSURANCE OF OHIO AND ROBERT L. MOULTON, AS DIRECTOR OF COMMERCE OF OHIO,

Defendants-Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The appellees in the above entitled cause, for their statement in opposition to appellants' statement as to jurisdiction herein and in support of appellees' motion to dismiss or affirm, respectfully state the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is the claim of the appellants, a New York corporation, and some 1100 of its agents, that certain Ohio statutes providing that an insurance agent may not "principally" use his license to insure property of which he is (among other capacities and relationships) the "owner" or "vendor," as interpreted and applied by the Superintendent of Insurance of the State

of Ohio and as construed by the Ohio courts, are contrary to and in violation of the Due Process and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Ohio trial and intermediate appellate courts sustained appellees' demurrer to the petition, and the Supreme Court of Ohio, the court of last resort, denied an appeal on the grounds that no debatable constitutional question, nor any question of public or great general interest was involved. The court further denied a rehearing on the matter.

The statutory provisions in issue are as follows:

Section 644, General Code.

"No person shall procure, receive, or forward applications for insurance unless a resident of this state and duly licensed by the superintendent of insurance. Upon written notice by an insurance company authorized to transact business in this state of its appointment of a person to act as its agent the superintendent of insurance, if he is satisfied that the appointee is a suitable person and intends to hold himself out in good faith as an agent; that appointee is honest, trustworthy and understands the duties and obligations of an agent and is familiar with the insurance laws of the state and with the terms and provisions of the policies and contracts of insurance he proposes to effect; that in applying for such license it is not appointee's purpose or intention principally to solicit or place insurance on appointee's own property or that of relatives, employers or employees or that for which they or the appointee is agent, custodian, vendor, bailee, trustee or payee, shall issue to appointee a license which shall state in substance that the company is authorized to do business in this state and that the person named therein is a constituted agent of the company in this state for the transaction of such business as it is authorized to transact therein. Such appointee, if he has not theretofore held a license as an insurance agent in this state, shall be required to

submit to a hearing and examination as to the above qualifications. Such notice by an insurance company of its appointment of an agent shall be upon a form furnished by the superintendent of insurance and shall be accompanied by a statement under oath by the appointee which shall give appointee's name, age, residence, present occupation, occupation for the five years next preceding the date of the notice and such other information, if any, as the superintendent of insurance may require, upon a blank furnished by him. Such examination and/or hearing shall be held and decision rendered by the superintendent of insurance within thirty days from date of application for license. The Superintendent of insurance, after the granting of such license, for cause shown, and after a hearing, may determine any persons so appointed, or any person heretofore appointed as agent to be unsuitable to act as such agent, and shall thereupon revoke such license and notify both the company and the agent of such revocation. Unless revoked by the superintendent of insurance or unless cancelled by him on written notice from the company or the agent that the agent's authority to act for the company has been terminated by the company, such license and any other license issued to an agent or any renewal thereof shall expire on the 30th day of June next after its issue. But any license issued and in force when this act takes effect or thereafter issued, may, in the discretion of the superintendent, be renewed for a succeeding year or years by a renewal certificate without the superintendent's requiring the detailed information required by this act. A foreign or alien insurance company shall pay a fee of two dollars for every such license and for each renewal thereof.

"The action of the superintendent of insurance in granting, revoking, renewing or refusing to grant, revoke or renew such license shall be subject to review in accordance with the provisions of the administrative procedure act (G.C. §§154-61 to 154-73).

"An insurance company shall be bound by the acts of the person named in the license within his apparent authority as its agent.

"This section shall not apply to life insurance companies, including fraternals nor to domestic mutual protective assessment fire associations as defined in section 9593 of the General Code nor affect the provisions of section 644-2 thereof."

Section 644-3, General Code.

"It shall be the duty of the superintendent of insurance to refuse to grant any license applied for, to refuse to renew, and to revoke any license of or to any appointee, agent, solicitor or foreign broker, when he is satisfied that the principal use of such license has been or is to procure, receive or forward applications for insurance of any kind, other than life, or to solicit, place or effect such insurance directly or indirectly upon or in connection with the property of such appointee, agent, foreign broker or solicitor or that of relatives, employers, employees, or that for which they or the appointee, agent, foreign broker or solicitor are or is agent, custodian, vendor, bailee, trustee or payee, or to evade or violate the provisions of section 9589-1 of the General Code.

"It also shall be the duty of the superintendent of insurance when a written complaint is filed with him that any such appointee, agent, foreign broker or solicitor has been, is or will be using any license or renewal thereof directly or indirectly for the purpose or purposes above set forth, to investigate such complaint forthwith. Provided, however, that in the event the superintendent of insurance finds there is no probable cause for complaint, he may order the complaint dismissed. Such action of the superintendent of insurance shall be subject to review by appeal to the court of common pleas of Franklin County, Ohio, provided such appeal shall be filed by the complainant with the superintendent of insurance and the court within thirty days after such action by the superintendent. Said cause shall proceed as a new civil action with the right of either party to submit evidence and to appeal.

"Unless the complaint has been dismissed as afore-

said, immediately upon completion of such investigation, the superintendent of insurance shall fix a time and place at which such complaint will be heard and shall give notice thereof to the complainant and to the appointee, agent, foreign broker or solicitor complained of. The date set for such hearing shall be within thirty days, but not earlier than fifteen days after the date of such notice. The complainant shall be a party, and any other person as defined by section 154-62 of the General Code upon application to the superintendent of insurance and for good cause shown may be made a party to such hearing. At such hearing, any party shall have the right to produce and examine witnesses and to participate in the investigation and hearing with all rights of a party under the provisions of the administrative procedure act including the right of appeal from any order entered therein to the common pleas court of Franklin County."

The Ohio courts found that appellants' agents, their employees or employers were "vendors" within the meaning of these statutes, and that the "principal use" of their licenses is as stated and admitted in paragraph 17(b) of the appellants' petition filed in the trial court, namely, "all but relatively few of the policies of insurance placed by said licensed agents * * * were on motor vehicles which had been sold by them or their employees or their employers."

Thus the issue reduces itself to a determination of whether the legislature through such statutes has reasonably exercised the police power of the State in regulating the activities of the State's licensed insurance agents.

II. The Facts

Motors Insurance Corporation, a member of General Motors Corporation family, entered Ohio with its auto dealer agency system, nominating some 1100 persons connected with motor vehicle dealership of General Motors

cars, for insurance agents' licenses. Hearings were held before the Superintendent of Insurance to determine the suitability of such persons to be licensed as insurance agents. At these hearings these applicants testified under oath that they did not intend principally to use their licenses to write insurance on property which they owned or for which they or their employers or employees were owners or vendors, as set out in Section 644, General Code. They had also previously so stated in their applications for licenses filed with the Department of Insurance.

Being satisfied as to their intent to abide by the Ohio law as set forth in Sections 644 and 644-3, General Code, on what is generally known as "controlled insurance business," the Superintendent of Insurance issued licenses to those nominated by Motors Insurance Corporation, cautioning them that their production records would be checked to ascertain whether they were complying with the principal use provision of the insurance law (Sec. 644 G.C.).

A year later affidavits of these same agents, in answer to questions by the Superintendent of Insurance, showed that substantially all of the business written by these agents was upon automobiles which were owned or sold by them, or their employees or employer. Paragraph 17(h) of the appellants' petition admits this fact. The superintendent then gave notice under the Ohio Administrative Procedure Act which brought the renewal of these licenses in question inasmuch as these agents had apparently violated the provisions of Sections 644 and 644-3, General Code.

Thereupon the plaintiffs-appellants filed suit in the State trial court to enjoin the superintendent from refusing to grant licenses to such agents, from refusing to admit such persons to examination, from refusing to renew such licenses, and from revoking such licenses.

As stated before, to this petition the defendants-appellees filed a demurrer which was sustained.

III. No Substantial Federal Question Is Presented by This Appeal

Appellants' authorities do not seem to oppose, but rather to admit:

(1) That the field of insurance, including the licensing of agents, is vested with a public interest and is highly regulated under the police power of the State.

La Tourette v. *McMaster*, 248 U. S. 465, 467, 63 L. Ed. 362, 39 S. C. 160.

Verducci v. *Casualty Company*, 96 Ohio St. 260.

Robbins v. *Hennessey, et al.*, 86 Ohio St. 181.

State, ex rel. Federal Union Ins. Co. v. *Warner*, 128 Ohio St. 261.

State, ex rel. Allstate Ins. Co. v. *Bowen*, 130 Ohio St. 347.

(2) That there, also, is a presumption that the legislature understands the needs of its people and that its legislation is based on adequate grounds.

Middletown v. *Texas Light & Power Co.*, 249 U. S. 152, 157, 63 L. Ed. 527, 39 S. C. 227.

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257-8, 75 L. Ed. 324, 51 S. C. 130.

City of Xenia v. *Schmidt*, 101 Ohio St. 437, 450.

Thus, it would appear that unless plaintiffs-appellants can show affirmatively that there is no basis for the statutory provisions in question, the acts of the legislature will have withstood their challenge.

A

The prohibition against using an insurance agent's license principally to solicit or place controlled business is a reasonable exercise of the police power and is directed

against certain evils in the insurance field, and is a satisfactory standard for determining the good faith of an insurance agent.

Pre-eminent among these evils was the situation which existed during the automobile shortage when the purchaser was at the mercy of the dealer, and was required to take the automobile loaded with unwanted accesories, including insurance coverage when the dealer had a licensed agent available. Plaintiffs-appellants admit (see paragraph 17(h) of their petition) that the principal use of their licenses has been to place insurance upon motor vehicles which they have sold, as in fact it was almost 100%.

Such legislation need not work a perfect cure. See:

Central Lumber Co. v. *South Dakota*, 226 U. S. 157, 160, 57 L. Ed. 164, 33 S. C. 66.

Hughes v. *Superior Court of California*, 339 U. S. 460, 94 L. Ed. 985.

Another evil at which the principal use test is directed is to prevent or hinder monopolistic control over any particular type of insurance coverage. The best example of this is the case at hand. The *figures presented in plaintiffs-appellants' petition filed in the trial court* show that approximately 1100 licensed insurance agents working out of approximately 450 General Motors dealerships, and placing only limited coverage on motor vehicles in the first full year of operation (1949), wrote business totalling $4,681,-846.94 in net premium volume, and exceeded only by the Farm Bureau Mutual Auto Insurance Company, which company has been in business in Ohio approximately 25 years and that in 1950 the net premium of Motors Insurance Company jumped to $6,226,391.01.

Another reason for the principal use test is found in Section 644, which has prescribed since its enactment that the applicant "intends to hold himself out in good faith as

an agent." The principal use which an agent makes of his license is one of the tests which the legislature has laid down to determine whether or not a person is an agent in "good faith."

B

There are abundant precedents for the exercise of the police power in the manner indicated by Sections 644 and 644-3 of the Ohio Code found in the laws and rulings of other States, none of which has been declared unconstitutional.

New York law pertaining to the licensing of insurance brokers authorizes the Superintendent of Insurance to refuse to issue or to renew a license, "if he finds that more than ten per cent of the aggregate net commissions received during the term of the existing license, if any, or to be received during the term of the license applied for, by the applicant, resulted or will result from insurance on property and risks * * * (of certain specified sources) * * *." McKinney's Consolidated Laws of New York Annotated, Book 27, *Insurance,* Section 119, paragraph 4.

New Jersey statutes provide as a condition to issuance of an agent's, broker's or solicitor's license:

> "* * * that the applicant
>
> * * *
>
> "(b) is actually engaged in the general insurance business, or a particular group or groups thereof with the general public, and * * *
>
> * * *
>
> "(g) he is then engaged in or intends to engage in the business of writing or negotiating insurance as his principal business or occupation or as a substantial part thereof, separate and apart from any connection which he may have with any partnership or corporation whose principal business is lending money, and

"(h) is not seeking such license principally for the purposes of negotiating or writing insurance on property owned by him, or in which he has an insurable interest, or on property or insurable interests of a relative or his employer, * * *."

New Jersey Statutes, Annot. Perm. Ed., Title 17, Chap. 22, Section 6.9.

In Chapter 17, Section 6.16 of the same volume of New Jersey Statutes, the grounds for revocation of an insurance license include where:

"(d), for any license year, the premium writings of the respondent, represented by the premiums or contracts of insurance obtained, countersigned or issued by him for the general public does not exceed those on contracts of insurance obtained, countersigned or issued by him covering his own property or insurable interests or that of his relatives and his employers, * * *"

Massachusetts law, which follows New York closely, requires the Insurance Commissioner to refuse to issue or to renew any license,

"* * * if he finds that more than ten per centum of the aggregate net commissions received * * * (by a licensee) * * * during the term of any prior license or renewal, or which would probably be received during the term of a new license, resulted or would result from insurance in or in respect to the property or any interest therein of any of the following. * * *"

Annotated Laws of Massachusetts, Vol. 5A, part I, chap. 175, Sec. 174C.

In Tennessee, the licensing law provides as follows:

"Sec. 6236-6. It shall be the duty of the commissioner of insurance and banking to withhold any license applied for, or revoke any license to any agent, solicitor or broker when he is satisfied that the principal use of such

> license is to effect insurance upon the property of such agent, broker or solicitor, or to evade or violate the provisions of section 6133 of the Code of Tennessee." Williams Tenn. Code Annot., Vol. 4.

The following account of official Rulings of the Tennessee Division of Insurance is reported in *Odle* v. *McCormack*, 185 Tenn. 439, 206 S.W. 2d, 416, 421:

> "In the Insurance Report of 1943, there appears an official ruling that 'Every agent must write at least four times as much business for the general public as he writes controlled business. Controlled business means business written for yourself, your employers, your business associates or affiliates, and all relatives nearer than cousins.' We find that Official Ruling No. 16 is to the same effect but much broader in scope in that controlled business includes the following who may be related to the insurance agent as 'agent, custodian, *vendor*, bailee, trustee or payee.' "

Under Texas law, no person may receive an insurance license unless he

> "• • • is, or intends to be actively engaged in the soliciting or writing of insurance from the public generally; • • • "

Also, a licensee is prohibited from engaging "in the insurance business principally to handle business which he controls only through ownership, mortgage or sale, family relationship or employment. • • •" Vernon's Annot. Texas Civil Statutes, Vol. 14, Art. 21.14, Sec. 5.

The preceding is not presented as an exhaustive study of the laws of other jurisdictions, but simply to indicate that many other states have enacted legislation which requires an insurance agent (1) to write no more than a maximum percentage of business on specified risks and (2) to be actively engaged in the insurance business with the general public.

C

The statutes as construed and applied do not violate the due process clause or equal protection principle of the Fourteenth Amendment.

The statutes are not limited in scope to automobile dealers. They cover all persons whether they be automobile dealers, real estate men, or others. They *apply* to all persons alike. There are no exceptions or qualifications in the laws. Nor do the laws restrict the right of any individual to enter into the insurance business. They simply require that those who desire to be insurance agents do not use their licenses principally to write controlled business.

The statutes do not prevent licensing of part-time insurance agents, no distinction or discrimination is made between full-time and part-time agents, between those who write general insurance,—that is, various lines—or those who write special lines, as do the appellants. The principal use test falls on all alike.

The Superintendent of Insurance in applying "the production record test," a mathematical test, did not act arbitrarily. Reference to the appellants' petition, as stated before, discloses that the business written by the agents was practically 100% controlled as shown after one year's experience.

The construction and application of the statutes in question do not destroy the insurance business of agents engaged in selling automobiles, but simply make such agents, along with all others, subject to the principal use test, and require the Motors Insurance Corporation and its agents to conform their way of doing business to the laws of Ohio. See *State, ex rel. Allstate Ins. Co.* v. *Bowen*, 130 Ohio St., 347.

That there is no debatable constitutional question involved in the present case, and any claim of such is frivolous, is made clear by pronouncements of this court in upholding

the acts of state legislatures attacked upon the grounds advanced here.

Because of its amazing similarity to the case at hand, the decision in *Daniel* v. *Family Security Life Ins. Co., et al.*, 336 U. S., 220, 787 S.C. Acts of 1948, p. 1947, 93 L. Ed., 632, 69 S. C. 550, will be considered and compared in detail.

Supreme Court Case	*This Case*
1. A South Carolina statute provides that life insurance companies and their agents may not operate an undertaking business, and undertakers may not serve as agents for life insurance companies (criminal sanctions are provided).	1. The complaint here is that certain "classes" are being deprived of their "right" to be insurance agents. (It would appear that the South Carolina is the stricter since it operates absolutely against a class.)
2. The moving party complained that it was the only concern affected by the law, and that its manner of doing business was being attacked unconstitutionally.	2. MIC insures only against risk of physical damage to and theft of motor vehicles, and operates only through General Motors dealerships, thus placing itself in a position vulnerable to the principal use test.
3. Complaint was made that the "insurance lobby" obtained the statute from the South Carolina legislature.	3. The same complaint has been suggested here.
4. It was argued there was no evil to be corrected by the legislation.	4. Same here.

This court's answer to each of the above points which was delivered in an unanimous opinion, is most persuasive.

In answer to the second point enumerated, this court said in a footnote following the opinion:

> "That respondent company is the only concern now affected by the statute does not, of course, mean a denial of equal protection. The statute is drawn in general terms; the company's success might well induce others to enter the business. See the dissenting opinion below, 79 F. Supp. at 73, 74. And see Mason v. Missouri, 179 U. S. 328."

The third point this court dismissed with the brief statement appearing at page 224, as follows:

> "It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality. • • • (citing cases) • • •"

The last point received a little more attention, but was dismissed with the following observation, at pp. 224, 225:

> "Despite evidence to the contrary, respondents see no evil to be corrected by this legislation. We are asked to agree with respondents and call the statute arbitrary and unreasonable.
>
> "Looking through the form of this plea to its essential basis, we cannot fail to recognize it as an argument for invalidity because this court disagrees with the desirability of the legislation. We rehearse the obvious when we say that our function is thus misconceived. We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system. The forum for the correction of ill-considered legislation is a responsive legislature.
>
> "We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can

we say that the statute has no relation to the elimination of those evils. There our inquiry must stop.

"This rationale did not find expression in *Liggett Co.* v. *Baldridge*, 278 U. S. 105, on which respondents rely. According to the majority in Liggett, 'a state cannot, "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." ' 278 U. S. at 113. But a pronounced shift of emphasis since the Liggett case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend. See *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, where the cases are reviewed.

"Our deference to the legislative judgment is particularly pronounced in a field as traditionally well regulated as insurance. See *Osborn* v. *Ozlin*, 310 U. S. 53, 65, 66; *La Tourette* v. *McMaster*, 248 U. S. 465, 467, 468; *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 416, n. 13."

A note found in 93 L. Ed., page 637, following the report of the above case reads as follows:

"The decision in *Daniel* v. *Family Security L. Ins. Co.* (1949) 336 US 220, 93 L. ed. 632 illustrates the unanimous view of the Supreme Court, announced in *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.* (1949) 335 US 525, 542, 557, 93 L. ed. 212, 225, 227, 69 S. Ct. 251, 260, 267, 6 ALR 2d 473, that the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the pubic welfare, the Court returning closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific Federal constitutional prohibition, or of some valid Federal law."

And in *American Federation of Labor* v. *American Sash & Door Co.*, 335 U. S. 538, 93 L. Ed. 222, in upholding the validity of state laws forbidding agreements to employ only union members, Justice Black had this to say:

> "• • • and concerning state laws we have said that the existence of evils against which the law should afford protection and the relative need of different groups for that protection 'is a matter for the legislative judgment.' *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 378, 81 L. Ed. 703, 713; 57 S. Ct. 578; 108 A. L. R. 1330. We cannot say that the Arizona amendment has denied appellants equal protection of the laws."

See also *Hall, Supt. of Banks* v. *Geiger-Jones Co.*, 242 U. S. 539, 61 L. Ed. 480, 37 S. C. 217, and *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 93 L. Ed. 533, 69 S. C. 463.

See also *Cohen* v. *Beneficial Loan Corp.*, 337 U. S., 541, 551, 93 L. Ed. 1528, 69 S. Ct. 1221. (The courts do not judge nor remark upon the wisdom and policy of a statute; legislation cannot be set aside because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it); *Osborn* v. *Ozlin*, 310 U. S. 53, 84 L. Ed. 1074, 60 S. C. 758 (upholding a Virginia statute providing that insurance contracts on Virginia property and persons could be effected only by licensed resident agents and that such agent may not share more than half of his commissions with a non-resident broker); *St. John* v. *New York*, 201 U. S. 633, 50 L. Ed. 896, 26 S. C. 554 (upheld discrimination in New York statute between producing and non-producing vendors of milk).

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Supreme Court of Ohio be affirmed.

Respectfully submitted,

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(3215)

FILED
JUL 31 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 241

MOTORS INSURANCE CORPORATION, a corporation, THE AVONDALE MOTOR CAR COMPANY, a corporation, and JOHN L. CASHMAN, for themselves and others similarly situated,

Plaintiffs-Appellants,

vs.

WALTER A. ROBINSON, as Superintendent of Insurance of Ohio and WILLIAM HARPER ANNAT, as Director of Commerce of Ohio,

Defendants-Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

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Defendants-Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

I.

Appellees' Statement confuses and fails to meet the issues presented.

Appellees' Statement confuses the issues in the following respects:

A. Appellees assert, contrary to the petition, that appellant dealer-agents have insured themselves or their

employees or employers. They say ("The Facts", third par.):

> "substantially all of the business written by these agents was upon automobiles which were *owned or* sold by them, or their employees or employer. Paragraph 17 (h) of the appellants' petition admits this fact." (Emphasis supplied—see also "Statement of Issues on Appeal", first par.)

But the very petition paragraph to which appellees refer states that

> "The plaintiff agents and those whom they represent admit that the principal use of their licenses has been to place insurance upon motor vehicles which they have sold." (See also petition par. 17(b), cited by appellees.)

Petition paragraph 14 states the negative:

> "In no instance has any policy of insurance solicited and placed by the plaintiff agents and those whom they represent named as a party insured the agent soliciting or placing such insurance or the employer of such agent."

Finally, the prayer for injunctive relief was limited to revocation of, or refusal to grant or renew licenses

> "upon the sole ground that the principal use of such licenses has been or will be to * * * place or effect insurance covering solely the interests of persons * * * other than such licensees, or their employes or employers, in motor vehicles which such licensees, or their employes or employers, have sold or are selling."

Had the dealer-agents used their licenses principally to insure themselves or their employees or employers with

respect to their own property or other insurable interests, their licenses properly would have been revoked and there would have been no lawsuit.

B. Appellees assert that "The Ohio Courts found that appellants' agents * * * were 'vendors' within the meaning of these statutes * * *". The Ohio Courts "found" no such thing because that was not disputed. The basic construction issue was the identity of the insured person contemplated by the statutory phrase:

> "property * * * for which * * * [the insurance agent or his] relatives, employers or employees * * * is * * * vendor * * *".

The effect of the statutes as construed and applied is to treat that clause as referring to the *vendee* as the insured person—thus immediately raising the constitutional issues which are presented here.

C. Although, by virtue of the demurrer, there is nothing before the Court except the allegations of the petition and facts which may be judicially known, appellees inject wholly irrelevant and, in some instances, inaccurate matter *dehors* this record. Appellees' statement that hearings were held to determine the suitability of certain dealer applicants for licenses, appellees' paraphrase of their testimony, and appellees' account of the "cautioning" by the Superintendent of Insurance respecting the checking of their production records are not matters of record here and are not accurately presented. Even if the facts with respect to these matters were as appellees have stated them, they would be irrelevant to the issues of statutory construction and constitutional law which are raised by the petition and the demurrer. Also beyond the record and irrelevant are

the figures respecting the volume of business done by the Farm Bureau Mutual Auto Insurance Company and the 1950 net premium income of Motors Insurance Corporation.

D. Appellees state:

> "Thus, it would appear that unless plantiffs-appellants can show affirmatively that there is no basis for the statutory provisions in question, the acts of the legislature will have withstood their challenge."

But appellants here challenge the constitutional validity of the construction and application of the statutes—not the statutes themselves. In this connection, in *State ex rel Allstate Ins. Co.* v. *Bowen,* 130 Ohio St. 347, 199 N. E. 355, cited by appellees, the validity of *different* provisions of Section 644 in its *prior* form (before addition in 1935 of the principal use provision) was involved.

II.

The statutes involved do not touch the evils asserted by appellees in justification of their interpretation.

Appellees repeatedly refer to "controlled business" as the subject of the Ohio legislation in question, but do not define the term. Appellants, in discussing the questions of statutory construction in the State Courts, agreed that the Ohio statutes are a species of so-called "controlled business" legislation, identical in purpose and scope with that of numerous statutes elsewhere. But appellants disagree with appellees as to the accepted meaning of the term. (See III, *infra.*)

A. Appellees assert that the "preeminent" evil against which the Ohio statutes are aimed was

> "the situation which existed during the automobile shortage when the purchaser was at the mercy of the dealer, and was required to take the automobile loaded with unwanted accessories, including insurance coverage when the dealer had a licensed agent available."

That this assertion is no more than a figment of the imagination is shown by the following:

1. As pointed out in appellants' jurisdictional statement, this could not have been a legislative purpose at the time of enactment because the principal use provision, the construction and application of which are challenged, was enacted in 1935 when there was not and never theretofore had been any automobile shortage.

2. The statutes (as distinguished from the challenged construction) are, as appellees say, "not limited in scope to automobile dealers"—so it is impossible to assume, as do appellees, that an evil peculiar to the automobile business was the object of the legislation.

3. The fact is, as the jurisdictional statement shows, that Section 9589-5 of the Ohio General Code makes it a criminal offense, and a cause in itself for license revocation, for the purchase of insurance from a particular company or agent to be made a condition precedent to the sale or financing of property.

4. The principal use test, as interpreted and applied by appellees, is not only not "a perfect cure" for this alleged

"preeminent" evil: It is no cure at all—it is not rational even as a palliative.

5. Finally, and conclusively, the Common Pleas Court, whose opinion[1] stands as the only authoritative voice of the state in the premises, found no such "preeminent evil" and declared an entirely different purpose of the statutes, as shown in the jurisdictional statement. The purpose so found and declared,

> "to prevent an unfair advantage in the placing of insurance and the licensing of persons who were not intending to do a general insurance business, but simply to supplement their primary business of selling automobiles"

was carried ruthlessly into effect by the appellees; and it is that purpose, and the manner and effect of its implementation, of which appellants complain as an invasion of their Federal constitutional rights.

Appellees would apparently have this Court infer that the appellant dealer-agents and those represented by them had been engaging in "tie-in" practices from the admitted fact that the principal use of their licenses had been to insure their car purchasers.

But the petition alleges (par. 11) and the demurrer admits that

> "Such agents may not make the placement of such insurance with said Motors Insurance Corporation a condition of such sales or of any sale or of such financing. *An option* of procuring such insurance through an agent and in a company of such a pur-

[1] This opinion is now unofficially reported in 106 N. E. 2d 572. The opinion of the Court of Appeals of Franklin County and the judgment of the Ohio Supreme Court may be found, respectively, in 106 N. E. 2d 581 and 105 N. E. 2d 61.

> chaser's choice is given every such purchaser. However, in most cases such *installment* purchasers in Ohio have elected to insure with said Motors Insurance Corporation." (Emphasis supplied.)

In this connection there is an obvious *non sequitur* implicit in appellees' statement: To say that the dealer-agents had placed most of their insurance for purchasers of cars from them or their employees is a very different thing from saying that most or all of their car purchasers took insurance from them. (See also appellees' statement that

> "the principal use of their licenses has been to place insurance upon motor vehicles which they *have* sold, *as in fact it was almost 100%.*" Emphasis supplied.)

B. The second claimed evil on appellees' list is monopoly. The state trial court did make a passing and speculative reference to monopoly; but, as the jurisdictional statement indicates, that reference is an obvious makeweight, inconsistent with the framework of the statutes and wholly without factual basis. Although irrelevant to the issues, appellees attempt to supply a factual basis by referring to the net premium volume of Motors Insurance Corporation's Ohio business in its first year, as set forth in the petition. Here is another *non sequitur*, inasmuch as this volume is not compared with the total of all companies for the same period, nor with the total premium volume of insurance covering owners of cars purchased from appellants and those represented by them. Without such a comparison, the 1949 Ohio net premium volume of Motors Insurance Corporation is meaningless, beyond showing a considerable measure of public acceptance of the company's insurance. Nor is the defect in appellees' reasoning cured

by the off-the-record comparison of Motors Insurance Corporation's 1949 net premium volume with that of another company for the same year, or with that of Motors Insurance Corporation for a subsequent year. The same *non sequitur* is present in each case. If the courts are to take judicial notice of such irrelevant facts at all, the whole official statistical picture should be brought in and considered. If that were done, appellants apprehend that no suggestion of "monopoly" would emerge; indeed, appellants did precisely that in arguing to the Common Pleas Court: They produced official and semi-official statistics for 1949 showing that Motors Insurance Corporation achieved less than 2% of the total potential Ohio new car market and less than 16% of the potential Ohio market for new General Motors vehicles.

C. Appellees say:

> "*Another reason* for the principal use test is found in Section 644, which • • • [prescribes] that the applicant 'intends to hold himself out in good faith as an agent'. The principal use • • • is *one* of the tests • • • to determine whether or not a person is an agent in 'good faith'." (Emphasis supplied.)

Without stopping to point out, as appellants did below, that the Courts of Ohio, in other cases, have held that the principal use test is not merely "one of the tests" of holding out in good faith, but the *only* one, the question in this Court is: If sought to be justified as a measure of "holding out in good faith", is appellees' construction and application of the principal use test constitutionally valid? That being the only question here relevant, appellants respectfully submit that appellees' reference to "good faith" as an *additional* objective of the statutes begs the constitutional questions.

III.

Legislation of other states affords no support for the constitutional validity of appellees' construction and application of the Ohio statutes.

Appellees cite as precedents for the Ohio legislation as construed and applied by them a number of state statutes and say that such state statutes require

> "an insurance agent (1) to write no more than a maximum percentage of business on *specified risks* and (2) to be actively engaged in the insurance business with the general public." (Emphasis supplied.)

Actually, as the terms of the state statutes quoted by appellees and numerous other statutes which might be cited[2] show, "actively engaged in the insurance business with the general public" is in every case merely the affirmative converse of the requirement "to write no more than a maximum percentage of business on specified risks"; and it is important to observe what the "specified risks" mentioned in these statutes are.

With the exception of the Texas statute, all such statutes deal with so-called "controlled business" in the sense in which the appellants, in the state courts, argued that that trade phrase should be understood if used to describe the Ohio statutes, namely, insurance written for the agent himself, which, by virtue of his commissions, he obtains at a

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[2] California, Deering's Calif. Code, Ann., Insurance, Vol. 1, Sec. 760 (Div. 1, Pt. 2, Ch. 1, Art. 5); Connecticut, Sec. 6060, General Statutes; Florida, Chapt. 27, Sec. 627.05(4) Florida Statutes; Georgia, Sec. 56-508, Code; Illinois, Smith-Hurd Ann. Ill. Statutes, Ch. 73, Insurance, Sec. 1065.55 (Laws of Ill., 1949, p. 1032 at p. 1038, Sec. 508); Kentucky Chapt. 21, Sec. 1, Revised Statutes, 1950; North Carolina, Chapt. 58, Sec. 58-41, General Statutes; Utah, Sec. 43-17-23, Utah Code (1951 Supp. p. 229); Virginia, Title 38, Sec. 38-83, Code of 1950; Washington, Revised Code, Sec. 48. 17.080 (Vol. 4, p. 3815).

discriminatorily low cost or that written for persons in close association with him either economically or socially whereby he acts rather in the guise of their representative than in the guise of a representative of the company: All apply the maximum percentage or principal use test to business of one or both of these classes irrespective of whether the agent had any *control over the placing* of that business; and none extends the description of "specified risks", so limited in percentage, to include the interests of persons to whom the agent or his employer or relative had sold the subject matter of the insurance. This is apparent from the very quotations made by appellees, except in the case of the New York statute; and it would have been apparent in that case also if appellees had quoted the statute sufficiently to reveal the "certain specified sources". The Texas statute, when it speaks of "control", is fundamentally different: There, the statutory term "control" is used in its ordinary sense as meaning *control over "the placing"* of the proscribed percentage of insurance business in the named relationships or transactions. *Board of Insurance Commissioners* v. *Duncan,* 174 S. W. (2d) 326 (Texas Civil Appeals, 1943, appeal to Supreme Court denied).

So these statutes of states other than Ohio are not precedents for the interpretation and application given to the Ohio statutes by the appellees; rather they are precedents for the interpretation of the Ohio statutes for which the appellants unsuccessfully contended in the state courts.

The Ohio statutes, as construed and applied by the appellees, are completely unique in restricting the proportion of insurance business which the agent may place for third persons solely because they purchased the subjects of insurance from the agent; and their practical effect in wholly denying the privilege or right of licensure as insur-

ance agents to automobile dealers is without precedent elsewhere.

In this connection it should be observed that the quotation from *Odle* v. *McCormack*, 185 Tenn. 439, 206 S. W. (2d) 416, 421, represents not the Tennessee statute, but a former, so-called "official" ruling of the Tennessee Division of Insurance which, as the report of the cited case would show, was not approved by the Supreme Court of Tennessee. A subsequent amendment of the Tennessee statute makes it clear that the concept of being actively engaged in the general insurance business with the general public is merely the obverse of not writing insurance principally for the agent himself or those in close association with him.[3]

Thus, even were a dealer-agent to confine his insurance solicitations and placements to his car purchaser market, he would still be "holding himself out in good faith as an insurance agent" and be "actively engaged in the insurance business with the general public".

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[3] Section 6236.59, Williams Annotated Code of Tennessee (Tennessee Laws, 1951, Ch. 84, Sec. 7), includes as a ground of revocation, etc.: "That the respondent is not actively engaged in the general insurance business, or a particular class or classes thereof, with the general public, *in that* the premium writings of the respondent, represented by the premiums or contracts of insurance obtained, signed, countersigned or issued by him for the general public do not exceed those on contracts of insurance obtained, signed, countersigned or issued by him covering his own property or insurable interests and that of his relatives and his employer; provided that, for the purposes of this paragraph B, liens, mortgages, titles retained by the seller in conditional sales contracts, or other interests in property held as security for debt, shall not be deemed property or insurable interests."

See also Section 6236.46, paragraph numbered "(9)" of the Tennessee Code governing life insurance agents, which provides: "Has obtained, or attempted to obtain such license, not for the purpose of *holding himself out to the general public as an agent, but primarily* for the purpose of soliciting, negotiating or procuring insurance or annuity contracts covering himself or members of his family, or the officers, directors, stockholders, partners, employees, of a partnership association, or corporation of which he or a member of his family is an officer, director, stockholder, partner or employee."

IV.

The constitutional issues are practical — not theoretical.

In discussing the constitutional issues appellees rightly say that the statutes themselves

> "are not limited in scope to automobile dealers. They cover all persons whether they be automobile dealers, real estate men or others. They *apply* to all persons alike."

But, as the jurisdictional statement makes plain, appellants are not complaining of any want of due process or denial of the equal protection of the laws which appears on the face of the statutes. The constitutional issues relate to the manner in which these Ohio statutes have been construed and applied by the appellees, in the light of the facts alleged in the petition and others so notorious as to be subject to judicial notice. Repeating in substance what was said in the jurisdictional statement, the fact is that because the automobile is in a class by itself as a subject of insurance and because a considerable portion of the automobiles which are distributed in Ohio and elsewhere are sold on the installment plan, the interpretation and application given to the Ohio statutes by the appellees so operate practically as to invade the constitutional rights of the appellants and those whom they represent. It is because of these facts that the insurance business of agents engaged in selling automobiles is actually destroyed by the construction and application of the statutes in question. The appellants are here raising questions of substance and not of form.

It is possible that other classes of persons, such as real estate agents, may be injured in their constitutional rights

by the construction and application of the Ohio statutes. The appellants are not claiming and are not required to claim that automobile dealers and their employes are the only victims of what they conceive to be a denial of the equal protection of the law. But they do assert that because of the nature of the automobile sales business, on the one hand, and of the peculiar nature of the automobile itself as a subject of insurance, on the other, automobile dealers and their employes are the victims of an unconstitutional construction and application of the state statutes.

One sentence in this part of appellees' statement might create the inference that appellants, in showing that the rigid and mechanical manner in which appellees apply the principal use test is in itself a violation of their constitutional rights, are merely charging abuse of official discretion. This is not so. As shown by the petition (par. 16), appellees, in making the rulings complained of, disclaimed any discretion in applying the mathematical formula.

V.

Daniel v. *Family Security Life Insurance Company* is not controlling.

The wide and fundamental distinction between the problem involved in *Daniel* v. *Family Security Life Insurance Company*, 336 U. S. 220, and that brought to the Court by the present appeal has been adverted to in the statement as to jurisdiction. The parallel statement attempted by the appellees to show the "amazing similarity" of the two is wholly superficial in that it does not so much as mention the distinguishing characteristic. That distinguishing characteristic lies in the fact that the South Carolina statute was palpably aimed at a generally recognized evil—the opportunity afforded to an undertaker, transmitting as insurance

agent the proceeds of a burial insurance policy, to obtain for himself the funeral business and to overpersuade the bereaved beneficiary to order an extravagant funeral. No comparable evil could be imagined as an objective of the Ohio statute as construed and applied. Consistently with the South Carolina objective, that state's statute absolutely forbade the issuance of insurance agents' licenses to undertakers, whereas no such express prohibition is to be found in the Ohio statutes, which, as pointed out in the jurisdictional statement, assume the propriety of the contemporaneous conduct of the motor vehicle sales and insurance businesses.

Moreover, the parallel is at fault in certain other respects. The appellants do not claim, as implied by appellees, that Motors Insurance Corporation is "the only concern affected" by the appellees' interpretation and application of the Ohio statutes. The fact is that numerous other companies and individuals are affected (see appellants' application for a rehearing, filed in the Supreme Court of Ohio), although this is not pleaded in the petition, which is confined to a proper class.

Nor have the appellants complained that an "insurance lobby" obtained the enactment of the Ohio insurance statutes, although this may well have been the case. The appellants do allege in their petition (par. 17c) that the complaints lodged against certain Motors Insurance Corporation agents with the appellee, Superintendent of Insurance, and pursuant to which the rulings here complained of were first made, were lodged by the Ohio Association of Insurance Agents Inc., the very name of which should sufficiently indicate to this Court the nature and scope of the actual underlying competitive interests involved. But appellants ask no more than that the interpretation and application of the Ohio statutes, of which they here complain, be "judged by results".

Conclusion.

Appellants respectfully submit that appellees' motion to dismiss or affirm is not well taken and that the Court should deny the same and note probable jurisdiction.

Respectfully submitted,

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OCTOBER TERM, 1952.

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Defendants-Appellees.

PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL.

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WALTER A. ROBINSON, as Superintendent of Insurance of Ohio and WILLIAM HARPER ANNAT, as Director of Commerce of Ohio,

Defendants-Appellees.

PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL.

Pursuant to Rule 33 of the rules of this Court and within the time as enlarged by order of Mr. Justice Reed dated October 28, 1952, plaintiffs-appellants, Motors Insurance Corporation, The Avondale Motor Car Company and John L. Cashman, for themselves and others similarly situated, pray that this Court grant rehearing of its decision, filed October 13, 1952, granting the motion to dismiss and dismissing the appeal in the above-entitled case and that the Court decide that there is probable jurisdiction on appeal to review the final judgment of the Supreme Court of Ohio entered therein.

Reasons for Granting Rehearing and for Noting Probable Jurisdiction.

It is respectfully submitted that the questions raised in this case are of such novelty and commanding public importance as to warrant a decision, upon reconsideration, that they are clearly substantial in the light of all of the standards of substantiality heretofore announced by this Court and that a reasoned opinion in this case is warranted.

Appellants felt that their Jurisdictional Statement and brief in opposition to appellee's motion to dismiss or affirm made it sufficiently plain that the Ohio statutes here involved are, *as construed and applied*, completely unique. Nowhere in the legislation of the several states with the exception of the New York statute condemned in *Hauser* v. *North British Mercantile Insurance Co.*, 206 N. Y. 455, 100 N. E. 52, and the thoroughly distinguishable South Carolina statute upheld in *Daniel* v. *Family Security Life Insurance Co.*, 336 U. S. 220, is there to be found a statute which either on its face or in practical effect, as applied, excludes persons connected with a particular business such as the sale of automobiles from the privilege of acting as agents for insurance companies. Nowhere in the legislation of the several states is there to be found a disqualification for licensure predicated upon the *principal use* of the agent's license to sell insurance to customers of his mercantile business in respect to property sold to them.

Appellants feel that the issues raised are substantial in the context of decided cases. Appellants are certain that a plenary brief and argument will demonstrate this to be so beyond question and will demonstrate also that the result of this case, if allowed to stand, will mark a point of departure in the application of the due process and equal protection principles.

The opinion of the Common Pleas Court of Franklin County, Ohio, is the only one which contains any discussion of the statutes as construed and applied by the appellees. Appellants believe that that opinion makes entirely clear that the sole purpose and effect of the challenged construction is to discriminate unjustly and without reason against persons engaged in the automobile sales business and to promote solely the private interests of a group of competing insurance agents. Appellants are not aware of any decision of this Court sustaining the validity of any such statute or construction.

The case is of immediate importance not only to the approximately 1,100 former insurance agents previously licensed by Motors Insurance Corporation in Ohio and to the many Ohio citizens connected with the automobile sales business who also desire—for the same reasons as do persons contemporaneously engaged in the real estate and insurance businesses—to be licensed as insurance agents and sell automobile insurance to persons who have purchased cars from them: The case is of vital importance to and its result adversely affects the interests of the automobile insuring public of that State.

But apart from the public importance of this case, it is submitted that the constitutional questions it raises are not "wholly formal" or "so absolutely devoid of merit as to be frivolous" or "so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy". *Chanute City* v. *Trader*, 132 U. S. 210; *New Orleans* v. *New Orleans Water Works Company*, 142 U. S. 79; *New Orleans Water Works Company* v. *Louisiana*, 185 U. S. 336; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308; *Zucht* v. *King*, 260 U. S. 174. Nor can it be said that each of the questions here raised requires no "analysis and

exposition for its decision". *Milheim* v. *Moffat Tunnel Improvement District,* 262 U. S. 710, 716-17.

Appellants have not presented a "mere gossamer claim" and this Court's prior decisions would surely appear "still [to] leave decent room for argument regarding the applicability of former rulings" to this case. Frankfurter and Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936,* 51 Harv. L. Rev. 577, 589, 592.

The very fact that three of the seven members of the Ohio Supreme Court did not concur in that tribunal's decision that no "debatable constitutional question" was involved would seem to militate against summary disposition of the constitutional issues here raised. This is particularly so because of the necessity for analysis in order to demonstrate the irrationality and invalidity of the construction here upheld as well as the absence of any prior decisions foreclosing—explicitly, plainly, or even inferentially—these issues. As stated in *Louisville & Nashville Railroad Co.* v. *Melton,* 218 U. S. 36 (at pp. 49-50):

> "We primarily dispose of a motion to dismiss, which is rested upon the ground that the Federal question relied upon has been so conclusively foreclosed by prior decisions of this court as to cause it to be frivolous, and therefore not adequate to confer jurisdiction. The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations, *a*,

> because analysis and expounding is necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; *b*, because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the Fourteenth Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and, *c*, because while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power consistently with the equal protection of the law clause to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review as construed below is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject."

Where, as here, the issues would plainly seem to "involve an element of novelty", summary adjudication at least results in an insufficiently defined extension of, if not—as counsel for appellant believe it does—a complete departure from, previous decisions. Moreover, "Behind the desire to be heard and to be told, lies solid experience" and appellants are sure that a "full hearing and the necessity of giving explicit reasons" will in this case "affect judgment". Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938,* 53 Harv. L. Rev. 579, 601, 604, 605. See also, Ulman and Spears, *"Dismissed for Want of a Substantial Federal Question",* 20 Boston Univ. L. Rev. 501, 529, 531 and Note, *The Insubstantial Federal Question,* 62 Harv. L. Rev. 488, 493, 494, 496.

Conclusion.

For the reasons set forth above and in the appellants' Statement as to Jurisdiction and brief in opposition to appellees' motion to dismiss or affirm, it is respectfully urged that rehearing be granted and that, upon such rehearing, this Court decide that there is probable jurisdiction on appeal to review the final judgment of the Supreme Court of Ohio entered herein.

Respectfully submitted,

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Dated: November 7, 1952

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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

CLARENCE D. LAYLIN
J. ROTH CRABBE
Counsel for Appellants

NOV 15 1952
HAROLD B. WILLEY, Clerk

No. 241.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

MOTORS INSURANCE CORPORATION, A CORPORATION, THE AVONDALE MOTOR CAR COMPANY, A CORPORATION, AND JOHN L. CASHMAN, FOR THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

vs.

WALTER A. ROBINSON, AS SUPERINTENDENT OF INSURANCE OF OHIO AND WILLIAM HARPER ANNAT, AS DIRECTOR OF COMMERCE OF OHIO,

Defendants-Appellees.

RESPONSE TO PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL.

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Defendants-Appellees.

RESPONSE TO PETITION FOR REHEARING OF DECISION GRANTING MOTION TO DISMISS AND DISMISSING APPEAL.

Pursuant to Rule 33 of the rules of this court the defendants-appellees, Walter A. Robinson, as superintendent of

insurance, and William Harper Annat, as director of commerce of the state of Ohio, respond herewith to the petition for rehearing of decision granting motion to dismiss and dismissing appeal in the above-entitled case.

It is respectfully submitted that no new questions or arguments are contained in the petition for rehearing. No principles of law nor statements of fact which were not fully argued and asserted in plaintiffs-appellants' prior brief are contained in the petition for rehearing; the petition for rehearing being solely a restatement of arguments previously presented.

This response becomes necessary, however, because of misleading inferences to be drawn from certain statements found on pages 2 and 3 of the petition to the effect that:

(a) No other state statutes comparable to the Ohio statutes may be found.

This is an unwarranted conclusion. Such other state statutes are set out on pages 9, 10, 11 and 12 of defendants-appellees' statement opposing jurisdiction.

(b) The Ohio statute excludes persons connected with the automobile business from the privilege of acting as agents for insurance companies.

This likewise is not the fact. The Ohio statutes simply require all insurance agents, no matter what other occupations or business they pursue not to use their licenses principally to write "controlled business."

(c) The statement that the opinion of the Common Pleas Court of Franklin county, Ohio, is to the effect that the Ohio statutes discriminate unjustly against persons engaged in the automobile sales business and promote the private interests of a group of competing agents.

The trial court in part had this to say with reference to that point:

> "The statute under consideration does not deprive any class, group or individual from securing an insurance license if he has the necessary qualifications and intends to use his license to conduct a general insurance business, qualified only by the provision that the license is not to be used primarily to effect insurance on his own property, or that of relatives, employees, employers, or that for which they or the licensee are or is agent, custodian, vendor, bailee, trustee or payee.
>
> It, therefore, cannot be successfully maintained that the effect of the statute is to deprive anyone from the right or ability or opportunity to secure a license to sell insurance."

Counsel for plaintiffs-appellants persist in referring to a **group** of competing agents. The only **group** involved consists of automobile dealers. All other licensees of the department, whether full time or part time agents and no matter how otherwise engaged, are required to comply with the "principal use" provisions of the Ohio statutes. Petitioners' complaint actually arises by reason of the refusal of the insurance department and the courts to exempt their one small group from the requirements of the statutes involved.

CONCLUSION.

Appellees respectfully submit that appellants' petition for a rehearing should be denied.

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No. 241. MOTORS INSURANCE CORP. ET AL. *v.* ROBINSON, SUPERINTENDENT OF INSURANCE, ET AL. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *J. Rath Crabbe* and *Clarence D. Laylin* for appellants. *C. William O'Neill*, Attorney General of Ohio, *Robert E. Leach*, Chief Counsel, and *Ralph Klapp* and *Don W. Montgomery*, Assistant Attorneys General, for appellees. Reported below: 157 Ohio St. 354, 105 N. E. 2d 61.

No. 96. [illegible]